THE

EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. IV.

MICHAELMAS TERM, 29 VICT., TO MICHAELMAS TERM 30 VICT.,
BOTH INCLUSIVE.

EDWIN TYRRELL HURLSTONE, OF THE INNER TEMPLE,

AND

FRANCIS JOSEPH COLTMAN, OF THE INNER TEMPLE,

ESQUIRES, BARRISTERS-AT-LAW.

LONDON:
H. SWEET, W. MAXWELL, AND STEVENS & SONS,
Law Booksellers and Publishers.
HODGES, SMITH & Co., GRAFTON STREET, DUBLIN.

1868.

LONDON:
RAYNER AND HODGES, PRINTERS,
109, Fetter Lane, Fleet Street.

JUDGES

OF THE

COURT OF EXCHEQUER,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir FREDERICK POLLOCK, Knt.
The Right Honourable Sir FITZROY KELLY, Knt. } Chief Barons.

BARONS.

Sir SAMUEL MARTIN, Knt.
Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.
Sir WILLIAM FRY CHANNELL, Knt.
Sir GILLERY PIGOTT, Knt.

ATTORNEYS GENERAL.

Sir ROUNDELL PALMER, Knt.
Sir HUGH M'CALMONT CAIRNS, Knt.
Sir JOHN ROLT, Knt.

SOLICITORS GENERAL.

Sir ROBERT PORRETT COLLIER, Knt.
Sir WILLIAM BOVILL, Knt.
Sir JOHN BURGESS KARSLAKE, Knt.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

ERRATA.

Page 64, last line, *for* "in" *read* "and."

65, first line, *for* "their" *read* "the."

78, marginal note, 5th line from bottom, for "plaintiff and his wife" *read* "defendant and his wife."

4th line from bottom, *for* "defendant wrongfully" *read* "plaintiff wrongfully."

99, first line, *for* "*Garth*," *read* "*Denman*."

119, Memoranda, *for* "*Evelyn Melbourne Ashley*, of Lincoln's Inn," *read* "*Anthony John Ashley*, of the Inner Temple."

Exchequer Reports.

MICHAELMAS TERM, 29 VICT.

1865.

Nov. 13.

Stanger and Another v. Miller.

In an action by trustees of a deed made by a debtor under the Bankruptcy Act, 1861, the defendant may set off a debt for rent payable to him by the debtor under a demise, and which became due after the execution of the deed, but before its registration.

THE declaration stated that the plaintiffs, "the trustees on behalf of the creditors of J. Bowles, a debtor, under a deed or instrument made and entered into between the said J. Bowles of the first part, the plaintiffs, as such trustees, of the second part, and the said creditors of the said J. Bowles of the third part, relating to the debts and liabilities of the said J. Bowles and his release therefrom, according to the clauses of the Bankruptcy Act, 1861, relating to trust deeds for the benefit of creditors, and under which said deed or instrument, all things necessary in that behalf having happened and been done, all the property comprised in the said deed or instrument, including the causes of action hereinafter mentioned, was and is vested in the plaintiffs, as such trustees as aforesaid," by &c., sue, &c.—"For money payable by the defendant to the said J. Bowles at the time of executing the said deed or instrument for goods bargained and sold by the said John Bowles to the defendant," &c.

The defendant pleaded (inter alia), as defence on equitable grounds to parcel of the money claimed, a plea, in substance, stating that the defendant and one G. Miller respectively demised and leased to the said J. Bowles, their

1865.
STANGER v. MILLER.

respective undivided moieties of a certain messuage, to hold from the 25th March, 1861, for the term of twenty-one years, at the yearly rent of 150*l.*, payable by equal quarterly payments upon the 24th June, 29th September, 24th December and the 25th March: and the said J. Bowles did thereby covenant with the defendant and the said G. Miller that he would during the said term pay the said yearly rent of 150*l.* upon the days appointed for payment thereof: that J. Bowles entered upon the demised premises: that G. Miller died, having devised his reversion to the defendant: that "after the death of G. Miller, and during the continuance of the term, the sum of 37*l.* 10*s.* for one quarter's rent of the said demised premises for the quarter of the year ending on the 24th December, 1864, became and was due and payable by the said J. Bowles to the defendant, who was then entitled to the reversion as aforesaid: that the said J. Bowles, *before and at the time of the registration* of the said deed or instrument in the declaration mentioned, and *before the defendant had any notice or knowledge of the said deed* or instrument, or of any act of bankruptcy committed by the said J. Bowles, and until and at the commencement of this suit, was and still is indebted to the defendant in an amount equal to that part of the plaintiff's claim to which this plea is pleaded, for the said quarter's rent which became due and payable as aforesaid on the said 24th December, 1864, which amount the defendant is willing to set off against that part of the plaintiffs' claim to which this plea is pleaded."

Demurrer, and joinder therein.

Patchett, in support of the demurrer.—These are not mutual debts between the plaintiffs and defendant within the meaning of the 2 Geo. 2, c. 22, s. 13. Upon the execution of the deed the rights of Bowles against his

debtors vested in the trustees: *Symons* v. *George* (*a*); and the defendant cannot set off against their claim a debt subsequently due from Bowles to him. It does not appear by the plea how the debt attempted to be set off became due, except that it was for rent due from Bowles before the registration of the deed, and it may be that the trustees, considering the lease of no value, allowed him to continue in possession, so that he would be liable to pay the rent notwithstanding the transfer of his estate to the trustees. In bankruptcy, the rent may be apportioned, but if the bankrupt continues in possession until the rent becomes due, the landlord may distrain his goods. [*Channell*, B.—Suppose the plaintiffs had been assignees under a bankruptcy, would there not have been a good "mutual credit" between the parties within the 171st section of the Bankrupt Law Consolidation Act, 1849? Under the 197th section of the Bankruptcy Act, 1861, the trustees are in the same position as assignees in bankruptcy.] Rent payable under a demise on a quarter day is not a "mutual credit" during the currency of the quarter. If it were, the 150th section of the Bankruptcy Act, 1861, would not have been required. There is no credit between the landlord and tenant; for rent payable under a demise does not, like interest, accrue de die in diem, but it becomes a debt instanter on the day on which it is reserved. [*Channell*, B.—The landlord may well be said to credit the debtor with the use and occupation of the house, and that is a credit which must in its nature terminate in a debt: note to *Rose* v. *Hart*, 2 Smith's Lead. Cas., p. 260, 5th ed.] In order to be the subject of set off, there must not only be mutual debts, but the debts must be mutual *between the plaintiff and defendant: Isberg* v. *Bowden* (*b*). [*Channell*, B.—

(*a*) 3 H. & C. 68; in error, id. 996. (*b*) 8 Exch. 852, 858.

1865.
STANGER
v.
MILLER.

That was a decision upon the Statute of Set-off, 2 Geo. 2, c. 22, s. 13.]

Keane, in support of the plea.—The registration of the deed is the dividing line, not its execution. That appears from the form of deed given by Schedule D. under the 200th section of the Bankruptcy Act, 1861, by which the debtor conveys his estate and effects to trustees to be administered as if he had been *at the date thereof* duly adjudged bankrupt. The word "date" has reference to the memorandum on the face of the deed of the day and the hour of the day of registration, required by the 196th section. Under the 150th section, the defendant might, in bankruptcy, have proved for a proportionate part of the rent up to the day of the adjudication; and therefore, although by the terms of the lease the rent was not due when the deed was executed, by force of the 150th section it accrued de die in diem. Until registration the title to the property remains in the debtor, and all actions must be in his name. If the debtor had sued the defendant, and the latter had pleaded this set-off, the debtor could not have replied that he was suing on behalf of the trustees, because the plea alleges that the defendant had no notice or knowledge of the deed: *Buck* v. *Lee* (*a*). By the 197th section, upon registration of the deed all parties are placed in the same position as if the debtor had been adjudged a bankrupt. The 199th section also shews that it is the registration which renders the deed operative. The deed, when registered, did not relate back to the time of its execution so as to defeat the defendant's right of set-off: *Ex parte Harrison* (*b*). The principle on which the doctrine of set-off in bankruptcy proceeds is explained by *Tindal*, C. J., in *Gibson* v. *Bell* (*c*).

(*a*) 1 A. & E. 804. (*b*) 26 L. J. Bank. 30.
(*c*) 1 Bing. N. C. 743.

Patchett, in reply.—The trustees might sue upon the deed before its registration. Registration is only necessary for the purpose of giving the trustees rights against non-assenting creditors. [*Pollock*, C. B.—Is there any instance of an action by trustees before registration? No doubt, where property is assigned by deed the trustees may sue for it, because the assignment is good at common law; but the assignment will not operate upon a *debt* so as to enable the trustees to sue for it in their own names unless the requisites of the statute are complied with.] By the 194th section, the only effect of not registering the deed is that it cannot be received in evidence. [*Pollock*, C. B.—The 197th section says that "from and after the registration" certain things shall take place; which is, in effect, saying that they shall not take place before.] The 7th condition of the 192nd section, which requires possession of the debtors to be given to the trustees immediately upon the execution of the deed, shews that the time of execution, not of registration, is the dividing line.

POLLOCK, C. B.—We are all of opinion that the plea is good. The plaintiffs, trustees of a deed under the Bankruptcy Act, 1861, claim a debt due from the defendant to the maker of the deed. But the right to sue for it did not pass upon the execution of the deed, nor until its registration, when the power of suing as in bankruptcy is created by the express provision of the 197th section. The defendant pleads a set-off for rent due to him from the debtor under a demise; and it is argued that as the rent became due after the execution of the deed it cannot be set off against the plaintiffs' claim. But the 150th section provides that in case of bankruptcy the person entitled to the rent may prove for a proportionate part thereof up to

1865.
STANGER v. MILLER.

the day of the adjudication; so that, in effect, it is the same as if the rent accrued from day to day. By the 197th section the registration of a deed of this kind is assimilated to an adjudication in bankruptcy, and as the defendant might have proved for this rent in bankruptcy, he has now a right to set it off against the plaintiff's claim.

BRAMWELL, B.—I am of the same opinion. The proper way to consider this question is to see what is the law under an adjudication in bankruptcy. Assuming for the present that the execution of the deed is analogous to an adjudication in bankruptcy, I think this would have been a good plea of mutual credit under the 171st section of the Bankrupt Law Consolidation Act, 1849. It is well known that whatever can be proved in bankruptcy may be made the subject of set-off in an action by the assignees against the creditor. Now, by the 150th section of the Bankruptcy Act, 1861, the defendant might have proved for a proportionate part of this rent up to the day of the adjudication of bankruptcy. Then, if the demise continued, rent might become due after the adjudication in bankruptcy, and although this rent might not be "a *debt* payable upon a contingency" within the meaning of the 177th section of the Bankrupt Law Consolidation Act, 1849, it might be "a *liability* to pay money upon a contingency" within the 178th section of that Act. In either case there would be a mutual credit, and therefore the subject of set-off in bankruptcy, and, if so, it is clear to my mind that this rent may be set off; for, by the 197th section of the Bankruptcy Act, 1861, the trustees are in the same position as if the debtor had been adjudged a bankrupt and they had been appointed assignees under his bankruptcy. Therefore, whether the date of the execution

of the deed, or of its registration, be taken as corresponding in point of time with an adjudication in bankruptcy, according to my view this plea of set-off is good.

Moreover, I am also of opinion that the plea is good, on the ground that the registration of the deed is the date with reference to which everything is to be considered; although there may be difficulties in the way, as in many other questions upon the construction of this Act. The 194th section applies to every deed made by a debtor, not being a bankrupt, for the benefit of his creditors, or his discharge from his debts and liabilities; and it requires the deed to be registered within twenty-eight days after its execution by the debtor; and by the 197th section upon the registration of the deed the provisions in bankruptcy come into operation. We must read the latter section as applicable as well to deeds binding creditors who have executed or assented to them as to those binding non-assenting creditors. But it is inconceivable that a deed executed on a given day, and which may be kept in the debtor's pocket, should, on its registration, have a retrospective operation, and relate back twenty-eight days, or such further time as the Court of Bankruptcy may, under section 194, have allowed for its registration. The deed becomes an official document, and determines the rights of parties under it, when an official sanction is given to it by registration. Therefore, I think that, as this debt was due to the defendant before the date of the registration of the deed, it was the subject of set-off as a mutual debt.

CHANNELL, B.—I am also of opinion that the plea is good, and that our judgment ought to be for the defendant. The plea is pleaded as a defence on equitable grounds, and the plaintiffs, who are trustees under the deed, are in the

1865.
STANGER v. MILLER.

same position as assignees in bankruptcy, and therefore the defendant is entitled to succeed if he shew either a mutual debt or a mutual credit. At the time of the execution of the deed, a portion of the rent reserved by the demise was payable, but only payable by virtue of the 150th section of the Bankruptcy Act, 1861, which gives a right to prove for a proportionate part of rent up to the day of the adjudication in bankruptcy, and so in effect causes it to accrue de die in diem. This therefore was a proveable demand, and consequently a good set-off under this equitable plea. The plaintiffs being in the same position as assignees in bankruptcy, whether this is a plea of a mutual debt or a mutual credit, it is a good answer to the action. But, further, the whole of the rent now sought to be set off was not only due by contract, but payable before registration, which I conceive to be the dividing line, so that there was an actual debt which might be set off.

We have been referred to the 7th condition of the 192nd section of the Bankruptcy Act, 1861, as affording an argument that the date of the execution is the time to be regarded. But I do not so understand that condition. The statute makes a clear distinction between the execution of the deed and its registration. It is registration which gives effect to the deed, and places the proceedings thereafter taken upon the footing of proceedings in bankruptcy; but for some purposes the deed, when executed, may have an inchoate operation, so as to entitle the trustees to take possession of the property comprised in it. Neither does it appear to me that the concluding words of the 194th section, that in default of registration the deed "shall not be received in evidence," have the operation contended for. In a variety of cases the deed would have to be given in evidence in order to support the rights of the trustees, and

the statute only provides that it shall not be given in evidence as a valid deed until its registration. Upon these grounds, it seems to me tolerably clear that the defendant is entitled to judgment.

PIGOTT, B., concurred.

Judgment for the defendant.

BOULNOIS AND ANOTHER *v.* MANN.

Nov. 20.

A composition deed under the Bankruptcy Act, 1861, which provides that, as soon as the trustees shall certify in writing that the requisite majority in number and value of creditors have assented to the deed, the debtor shall pay the composition, is unreasonable and void as against non-assenting creditors.

DECLARATION for goods sold and delivered, &c.

Plea.—That after the accruing of the causes of action, and after the 11th October, 1861, the defendant was indebted to the plaintiff and to divers other persons, and thereupon a deed, bearing date, &c., was made and entered into, &c. —The plea set out the deed, which (so far as material) was as follows:—

This indenture, made the 15th day of August, 1863, between James Mann, of, &c., of the first part, Thomas Fuller, of, &c., of the second part, John Cole, of, &c., of the third part, and the several persons who have assented hereto, or whose names or seals are hereunto subscribed and affixed, being respectively creditors either in their own right or in copartnership, or attornies or agents of creditors, of the said James Mann, of the fourth part, witnesseth as follows:—(The 1st clause declared that the expression "the trustee" shall mean the party of the third part.)

4. As soon as the trustee shall, in writing under his hand, certify that these presents have been executed or in writing assented to or approved of by a majority in number representing three-fourths in value of the now existing

1865.
Boulnois v. Mann.

creditors of the debtor whose debts respectively amount to 10*l.* and upwards, the debtor shall pay to each of his now existing creditors such a sum of money or composition dividend as shall be equal to the amount of 5*s.* in the pound upon the whole debt now due to such creditors respectively.

10. Unless and until these presents shall become void under the proviso hereinafter contained, the creditors of the debtor who shall have executed or otherwise acceded to or be bound by these presents, shall not, nor shall any of them, nor shall their respective heirs, executors or administrators, or partners or assigns, at any time (except so far as may be necessary in order to enforce any mortgage, lien or security, or any rights or remedies against any persons other than the debtor), commence or prosecute any action or suit at law, or in equity, or other proceeding, or obtain, or endeavour to obtain any adjudication of bankruptcy against the debtor, or his heirs, executors or administrators, or make or sue out any attachment or sequestration of or upon him or them, or his or their property, credits or effects for or on account of all or any part of the debts now due from the debtor to the said creditors who shall have executed or otherwise acceded to or be bound by these presents, or any of them, or for or on account of any claim of such creditors proveable under these presents; and if any of them the said last mentioned creditors, or their heirs, executors or administrators, partners or assigns, shall in any respect fail to observe this agreement, then and in every such case this present agreement shall operate and enure, and may be pleaded in bar as an effectual release of such debts or claims, and all demands in respect thereof.

12. In case and as soon as the trustee shall, at any time

thereafter, certify by writing under his hand that a sufficient proportion in his judgment in number and value of the creditors of the debtor has not executed or in writing assented to or approved of these presents, or the provisions hereof, or in case the debtor shall fail to pay the amounts hereinbefore covenanted to be paid by him, or any or any one of them, or any part thereof, to the creditors or creditor to whom the same are or is respectively due, upon the same being demanded by such creditors or creditor, then and in either of such cases these presents and every thing herein contained shall, except as to any acts or things heretofore done in pursuance hereof and without prejudice to any right of action theretofore accrued hereunder, cease and be void.

The plea concluded with the usual averments of compliance with all the conditions required by the Bankruptcy Act, 1861, and that the plaintiffs were bound by the deed.

Demurrer, and joinder therein.

Holl, in support of the demurrer.—The 4th clause, taken in connection with the 10th and 12th, is unreasonable. The debtor is to pay the composition, not upon the event of the requisite majority in number and value of creditors assenting to the deed, but upon the trustee certifying that fact in writing. By the 10th clause the creditors are precluded from suing unless the deed is void under the 12th clause, that is, if the trustee shall certify in writing that a sufficient proportion, in his judgment, in number and value of creditors has not assented to the deed, or if the debtor shall fail to pay the composition. But he cannot make default until the trustee has certified under the 4th clause. [*Bramwell*, B.—A creditor might bring his action and be defeated by a plea of the deed, and after judgment against him the trustee might certify

1865.
BOULNOIS v. MANN.

that the deed was void.] The trustee has an absolute discretion, and he may delay his certificate for years, or never certify, or die after the requisite majority in number and value of creditors had assented. The 12th clause, indeed, contains a reservation of any right of action which accrued under the deed, but none could accrue until the trustee certified under the 4th clause. [*Pollock*, C. B.—The statute makes the deed binding when the conditions are fulfilled, not when some one has certified that fact. Is there any provision in case the trustee should come to a wrong conclusion?] None whatever. Moreover, the plea contains no averment that the composition has been paid or tendered.

Harrington, in support of the plea.—The 4th and 12th clauses are not unreasonable. [*Bramwell*, B.—Suppose the requisite majority in number and value of creditors assented to the deed, but the trustee, by mistake, certified that they had not.] It is not to be assumed that the trustee, who is appointed to protect the interest of the creditors, will act negligently, and, if he did, there is a remedy in equity. It is the duty of the trustee to certify within a reasonable time. His intervention is only a convenient mode of ascertaining when the composition money becomes payable. It is not unreasonable that the trustee should certify that the deed has been executed by the requisite majority in number and value of creditors before the debtor is called upon to pay the composition. [*Bramwell*, B.—Where is the right of action between the time when the requisite majority of creditors assent and the trustee certifies, in gremio legis or in nubibus?] It is suspended, as in the case of a promissory note payable at a future day given for a present debt. Instead of a covenant to pay the com-

position on a certain day this is a covenant to pay it on a day to be determined by the trustee. The 12th clause must of necessity refer only to assenting creditors; for if the requisite majority do not assent, the deed can have no operation. It is no objection that assenting creditors place themselves in a worse situation than the others: *Hidson* v. *Barclay* (*a*).

Holl replied.

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to judgment. This is a demurrer to a plea, which sets out a composition deed under the Bankruptcy Act, 1861. One rule which has been laid down is that such a deed is invalid if it does not place all the creditors upon an equal footing. Perhaps in this case the creditors would be upon an equal footing, if the deed were valid; but it contains a provision that the composition money shall not be paid until the trustee named in the deed has certified that the requisite majority in number and value of creditors have assented to the deed. That is a novel condition, and wholly unwarranted by the statute. It is obvious that it may create great difficulty; for, if the certificate be not obtained, the debtor's estate cannot be administered. The Act intended that when the requisite majority in number and value of creditors assented, the deed should operate, not that when the statutory conditions were complied with something more should be done before the creditors obtained their rights under it. It appears to me that this deed is not within the Act, and therefore not binding on non-assenting creditors.

BRAMWELL, B.—I am of the same opinion. I think the

(*a*) 3 H. & N. 361.

1865.
BOULNOIS v. MANN.

4th clause unreasonable in point of law, as well as inexpedient in point of policy. It is almost a violation of the rule that the authority conferred on one person cannot be delegated by him to another. According to the statute non-assenting creditors are not bound by the deed unless the requisite majority in number and value of creditors have assented to it, but when that event takes place they are bound. Then why should anything further be done for the purpose of ascertaining the fact before they can obtain their rights under the deed? If the provision had been that no creditor should be bound by the deed unless the certificate was given, that would have been more reasonable. But here is a deed by which non-assenting creditors are to be bound, although they can have no rights under it unless the trustee certifies. Upon the ground that the deed is unreasonable in point of law, and not upon the supposition that the trustee might not perform his duty, my judgment is for the plaintiff.

CHANNELL, B.—I agree that our judgment ought to be for the plaintiff; and I have come to that conclusion on the ground stated by my brother *Bramwell*. It is not necessary to hold that this requisition is inexpedient, or to assume that the trustee might not perform his duty; but taking it for granted that the requisition would be fairly and properly complied with, it seems to me that the deed does not disclose a legal answer to the action. Upon these pleadings I assume that the deed has been executed by the requisite majority in number and value of creditors, and therefore the question is, what is its operation as against the plaintiffs, who have neither executed it or assented to it. It is clear that if the deed is good it must be supported on the ground that it is a composition deed; and there is

no provision for payment of the composition except that contained in the 4th clause, so that, if that clause were struck out, it would not admit of argument that this was not a bad plea. If the 4th clause had simply provided for payment of the composition upon the execution of the deed by the requisite majority in number and value of creditors, I do not say that would not have been a good contract of composition; but the clause is fettered by the introductory words, which make the composition payable only in the event of the trustee giving his certificate. I do not think that a reasonable condition: and if it be struck out there is nothing in the deed to bar the plaintiff's action.

I will only add that when the statute has said that a deed executed by three-fourths in number and value of creditors shall be valid and effectual, provided certain conditions are complied with, one of which is that an affidavit shall be filed stating that the requisite number of creditors have assented in writing to the deed, I see no reason for resorting to any other mode of ascertaining the fact.

PIGOTT, B.—I am of the same opinion, and for the same reasons.

Judgment for the plaintiff.

1865.

Nov. 15.
Dec. 5.

A deed of composition under the Bankruptcy Act, 1861, is not invalid because it contains an assignment of all the debtor's estate and effects to a trustee absolutely, with a proviso that until default in payment of the composition the debtor may hold and enjoy the estate and effects, and use and deal with the same.

The 7th condition of the 192nd section of the Bankruptcy Act, 1861, does not mean that the debtor's property must be given up to the trustee, but that if the deed provides for its being given up, in order to bind non-assenting creditors, the property must be given up in accordance with the terms of the deed.

A deed under the Bankruptcy Act, 1861, is not invalid because it contains no reservation of rights against sureties, where it does not appear that there are any sureties.

Nor is such a deed invalid because it releases the debtor in consideration of his covenant to pay the composition, not in consideration of its payment.

Where the release is absolute, the deed may be pleaded without averring a tender of the composition money.

JOHNSON *v.* BARRATT.

DECLARATION for goods bargained and sold, &c.

Plea by way of equitable defence.—That after the accruing of the plaintiff's claim, and after the 11th October, 1861, the defendant was indebted to the plaintiff and divers other persons, and thereupon, after the commencement of this suit, and when the defendant was indebted as aforesaid, a deed, being an indenture bearing date, &c., was made, &c.—The plea then set out the deed (so far as material) as follows :—

This indenture, made the 28th day of April, 1865, between Thomas Barratt, of, &c., tailor and draper, hereinafter called the debtor, of the first part, Edward Genever, of, &c., on behalf and with the assent of the creditors of the said Thomas Barratt, parties hereto, of the second part, and the several persons, companies and firms who are creditors of the said debtor, hereinafter called the creditors, of the third part. Whereas the said debtor hath proposed to pay to all his creditors, as well those who assent as those who shall not assent to or execute these presents, a composition of 5*s.* in the pound in satisfaction and discharge of their several debts by two equal instalments of 2*s.* 6*d.* in the pound in manner following, that is to say 2*s.* 6*d.* in the pound upon or immediately after the date of the registration of these presents, and the remaining 2*s.* 6*d.* in the

pound in three calendar months from the day of the date of the registration of these presents, the last of such said instalments to be secured by the promissory note of the said debtor, and of Henry Barratt, of, &c., bearing date on the day of the registration of these presents as aforesaid, and also by the covenant and assignment of the said debtor hereinafter contained. Now this indenture witnesseth that the said debtor doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said Edward Genever, of the second part, and also to and with all his said creditors, and their and each of their heirs, executors, administrators and assigns, that he, the said debtor, his executors and administrators, shall and will pay to all his said creditors, as well those who shall assent as those who shall not assent to or execute these presents, a composition of 5*s.* in the pound upon their several and respective debts, in the proportions, at the times and in manner hereinafter mentioned, that is to say, 2*s.* 6*d.* in the pound upon or immediately after the day of the date of the registration of these presents, and the remaining 2*s.* 6*d.* in the pound at the expiration of three calendar months from the time of such registration as aforesaid, the last of such said instalments to be secured by the promissory note of the debtor and of Henry Barratt, of, &c., bearing date and to be delivered to the said creditors on the day of the date of the registration hereof. And this indenture further witnesseth that for the further and better securing the payment of the said composition of 5*s.* in the pound as aforesaid, he, the said debtor, hereby conveys and assigns all his estate and effects, both real and personal, of whatsoever nature or kind, and wheresoever situate, which now are or hereafter during the continuance of these presents may come into his possession, or to which he may become entitled, whether in possession or reversion,

1865.
JOHNSON v. BARRATT.

remainder or expectancy, unto the said Edward Genever absolutely: Provided nevertheless that until default shall be made in payment of the said composition, or either of the instalments thereof, in pursuance of the covenant of the debtor hereinbefore contained, it shall be lawful for the said debtor, his executors, administrators and assigns, to hold and peaceably enjoy the real and personal estate and effects hereby conveyed and assigned, or intended so to be, and to use and deal with the same, and also to carry on his trade as a tailor and draper without any interruption or disturbance of or from the said Edward Genever, or by any of his creditors, &c.; but in case default shall be made in payment of the said composition, or either of the said instalments, to either or any of his said creditors according to the covenant of the said debtor hereinbefore contained, it shall be lawful for the said Edward Genever, his executors, administrators and assigns, to apply and administer all the said estate and effects of the debtor for the benefit of the creditors of the said debtor in like manner as if the said debtor had been duly adjudged bankrupt. And this indenture also witnesseth that in consideration of the covenant and assignment hereby made by the debtor as aforesaid the said several and respective creditors of the said debtor by themselves, or by their agents or attornies, do hereby for themselves severally and respectively, and for their several and respective heirs, executors and administrators, and their several and respective partner and partners, and not one of them for the acts or deeds of the other or others of them, but each of them for his own acts, and his heirs, executors and administrators only, and for the acts and deeds of his partners or partner only, acquit, release and discharge the said debtor, his heirs, executors and administrators, from all debts due to the said creditors respectively from the said debtor, and from all ac

tions, suits, judgments, executions, claims and demands whatsoever in respect thereof. In witness, &c.—Averments: that a majority in number, representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards, did in writing assent to and approve of the said deed, and the said Edward Genever, the trustee appointed by the said deed, executed the same; and the execution of the said deed by the defendant was attested by a solicitor; and within twenty-eight days from the day of the execution of the said deed by the defendant the same was produced and left (having been first duly stamped) at the office of the chief registrar of the Court of Bankruptcy for the purpose of being registered, and together with such deed there was delivered to the said chief registrar an affidavit by the defendant that a majority in number, representing three-fourths in value of the creditors of the defendant whose debts amounted to 10*l.* or upwards, had in writing assented to and approved of the said deed, and also stating the amount in value of the property and credits of the defendant comprised in the said deed; and the said deed did, before the registration thereof, bear such ordinary and ad valorem stamp duties as were provided by the Bankruptcy Act, 1861, in that behalf; and immediately on the execution of the said deed by the defendant possession of all the property comprised therein of which the defendant could give or order possession was given to the said Edward Genever, and at the time of the execution of the said deed the plaintiff was a creditor of the defendant in respect of the claim herein pleaded to, within the meaning of the Bankruptcy Act, 1861, and all conditions having been performed, and all things having happened, necessary in that behalf, the plaintiff became, and was, and is, bound by the said deed as if he had been a party thereto and had

1865.
JOHNSON v. BARRATT.

duly executed the same; and the defendant has always been ready and willing to pay the first instalment of 2*s.* 6*d.* in the pound on the amount of the plaintiff's claim, and to give the plaintiff the promissory note of himself and the said Henry Barratt for the amount of the second of the said instalments, bearing date the day of the said registration, and payable to the plaintiffs three months after date, and he now brings into Court the sum of 5*l.* 18*s.* 6*d.*, being the full amount of the said instalment ready to be paid to the plaintiff, and before pleading this plea he tendered to the plaintiff the amount of the said first instalment and the said promissory note.

Demurrer, and joinder therein.

Macnamara, in support of the demurrer.—The deed is void as against non-assenting creditors on several grounds. First, it purports to assign all the debtor's property to a trustee, and yet it provides that the debtor may retain possession of and use it, and carry on his trade until default in payment of the composition. A deed containing such a provision is unreasonable, illusory, and in contravention of the 7th condition of the 192nd section of the Bankruptcy Act, 1861, which requires the debtor, immediately on the execution of the deed, to deliver up possession of the property comprised therein.

The Court then called on

H. James, to support the plea.—First, a cessio bonorum is not necessary, and, notwithstanding the 7th condition of the 192nd section, a deed may be valid although the debtor does not give up possession of any part of his property: *Clapham* v. *Atkinson* (*a*). There are two ways in which the 7th condition may be read, either that the deed

(*a*) 4 B. & S. 730.

need not in terms contain an assignment of the debtor's property if possession be given up, or that, if there be an assignment, there must be a delivery of possession in accordance with the terms of the deed. By the terms of this deed the debtor is not bound to give up possession of his property until he makes default in payment of the instalments. That is said to be unreasonable. But against whom? As regards assenting creditors, they are the best judges of what is for their own interest; and if the stipulation is not unreasonable as against them, how can it be so as against non-assenting creditors, who are not in a worse position than assenting creditors. [*Channell*, B.—There is no inequality between the creditors, and therefore the objection must be confined to unreasonableness, but it may be that the debtor's having possession of his stock in trade will enable him to pay his creditors.] The plea contains no averment that the property retained by the debtor is of greater amount than the debts; therefore it cannot be assumed that there is anything unreasonable in his retaining it. If there had been no cessio bonorum, the deed would not have been unreasonable; then how is it worse because the creditors are in a better position, and have the right, in a certain event, to take possession of the debtor's property? The plea avers that on the execution of the deed possession of all the property comprised in it was given to the trustee. The trustee might, in his discretion, return the property to the debtor in order to enable him to carry on his trade for the benefit of his creditors; and, if so, why may not the creditors provide that the debtor may retain possession of it? The covenant, and not the property, is relied on as the means by which the composition is to be paid. The plea avers that everything has been done to render the deed binding on the plaintiff. If the assignment is illusory, the property did not pass to the trustee, and the deed is

1865.
JOHNSON v. BARRATT.

good on the authority of *Clapham* v. *Atkinson* (*a*).—(He was not called upon to argue the other points (*b*).)

Macnamara, in reply.—First: *Clapham* v. *Atkinson* was a mere composition deed, and contained no assignment of the debtor's property. To enable the debtor to retain possession of his property, the deed should have been framed as in *Clapham* v. *Atkinson*, or as a deed of inspectorship. This deed, upon the face of it, purports to assign all the debtor's property to the trustee absolutely, and it is an evasion of the statute for the debtor to retain possession of it. The 7th condition means that bonâ fide possession of the property shall be given to the trustee. Practically, the security of the assignment is worthless; for the debtor might dispose of all the property. [*Pigott*, B.—Suppose there was no cessio bonorum in the deed, and possession of the property was given up to the trustee, and he immediately handed it back to the debtor, would that be lawful?] It would be a question whether the transaction was bonâ fide or merely colourable. Here the trustee was bound by the terms of the deed to let the debtor retain the possession and control of the property. [*Bramwell*, B.—Is it not a reasonable construction of the 7th condition of the 192nd section to say that it does not regulate the form of the deed, but only enjoins compliance with its terms, if non-assenting creditors are to be bound by it?] Though a cessio bonorum is not necessary if the deed contains an absolute assignment of the debtor's property, the 7th condition requires that possession of the property should be given up to the trustee. The only limitation is if "the debtor can give or order possession" of it.—Secondly, the deed is bad, because it contains an absolute release

(*a*) 4 B. & S. 730.

(*b*) As to these points, see the argument of *Macnamara*, *infra*.

without a reservation of rights against sureties. It is not necessary to aver that there are sureties. In *Balden* v. *Pell* (*a*) and *Woods* v. *Foote* (*b*), where a covenant to indemnify the debtor against outstanding bills of exchange was held unreasonable, the plea contained no averment that there were any creditors holding bills. In *Keyes* v. *Elkins* (*c*), where the deed contained a proviso that the release should not prevent any of the creditors from suing any person other than the debtor liable to the payment of any security, *Crompton*, J., said:—"It is absolutely necessary to hold that a deed which contains a release of the debtor should contain a provision reserving to the creditors their rights and remedies against sureties;" and *Mellor*, J., said:—"If the remedies against sureties were not preserved, a majority who have only claims against the debtor without any responsible surety might inflict upon the minority, who had claims against the sureties, the greatest injustice in binding them by the deed."—Thirdly, the release is in consideration of the debtor's covenant to pay the composition, not in consideration of its payment, and that is unreasonable. Upon the debtor's default in payment, the trustee may take possession of his property, but there is no covenant by the trustee to pay the creditors, so that their only remedy against him is in a Court of equity. The release should have been conditional on payment of the instalments, or subject to a proviso that in default of payment it should be void: *Fessard* v. *Mugnier* (*d*). By this release the creditors are deprived of their right to sue the debtor for the original debt, and it is useless to sue him for the composition, because, upon his default, the trustee may take possession of all his property. Either the release is absolute, and therefore unreasonable, or if it

(*a*) 5 B. & S. 213.
(*b*) 1 H. & C. 841.
(*c*) 5 B. & S. 240.
(*d*) 18 C. B. N. S. 286.

1865.
JOHNSON v. BARRATT.

be construed as conditional it does not dispense with the obligation on the part of the debtor to tender the composition money according to the terms of the deed.—Fourthly, the plea contains no sufficient allegation of tender. It ought to have been averred that the debtor tendered the first instalment upon or immediately after the day of the date of the registration of the deed: *Hazard* v. *Mare* (*a*), *Fessard* v. *Mugnier* (*b*). It makes no difference that this plea is pleaded by way of equitable defence, because a Court of equity would only grant relief upon payment of the instalments.

BRAMWELL, B.—Upon the first point we will take time to consider our judgment.

As to the objection that there is no reservation of rights against sureties, it does not appear that there are any sureties, and in the absence of an allegation to that effect we cannot assume that there are.

The next objection is that the release is absolute, not conditional upon payment of the composition, and therefore unreasonable. But whatever my opinion may be as to the reasonableness of an absolute release, when the creditors only get a covenant to pay them 5*s.* in lieu of 20*s.*, I think that is a matter for the creditors themselves to determine. In some cases it may be to their advantage to accept those terms, particularly if they obtain the security of a surety. But, however that may be, the Court cannot say that in point of law it is unreasonable.

The remaining objection is, that if the release is conditional the plea should have contained an averment that the first instalment was tendered at the time appointed for its payment; but the answer is, that the release is in terms absolute, and therefore the question does not arise.

(*a*) 6 H. & N. 434. (*b*) 18 C. B. N. S. 286.

CHANNELL, B.—I am also of opinion that upon the points on which my brother *Bramwell* expressed his opinion the defendant is entitled to judgment.

If the deed is not upon the face of it unreasonable, we cannot assume the existence of rights against sureties so as to make it unreasonable.

As to the objection that the deed is unreasonable because the release is absolute, the Courts have held a deed unreasonable where all the creditors are not placed on an equal footing. But no argument has been or could be urged before us that there is any inequality in this case. No doubt a deed may be unreasonable, although there is no inequality between the creditors, as, for instance, where the deed contains some provision which upon the face of it is so unreasonable that the Court cannot give effect to it; but that is not so here. I dissent from the doctrine that because we, sitting as Judges, may, as a matter of private opinion, think a particular provision in a deed unreasonable, therefore we should say, as a matter of law, that the deed is unreasonable and void. Where a deed of this kind is pleaded as a defence, we ought to see whether it can be supported by any rule of construction; and in the case of *Garrod* v. *Simpson* (*a*) we held the deed pleadable in bar as an accord and satisfaction, although it contained no release.

As to the last objection, I agree that the release is absolute, and therefore the point as to tender does not arise.

PIGOTT, B.—I concur in opinion. With respect to the point as to the reservation of rights against sureties, I have nothing to add to what has been already said.

(*a*) 3 H. & C. 385.

1865.
JOHNSON v. BARRATT.

As to the objection that the deed is unreasonable because the release is absolute, we must consider in what sense the word "unreasonable" is used. If in the sense of "imprudent," that is a matter, not for us, but for the creditors, to determine. If the word is used in the sense of "unequal" or "unjust," sitting as a Judge I can see nothing unreasonable in the release, though absolute.

As to the question of tender, that depends on whether the release is absolute or conditional. I am of opinion that it is not conditional: it is expressed to be made in consideration of the covenants and assignment.

POLLOCK, C. B.—I entirely agree with my learned brothers upon the points on which they have given judgment, and for the reasons which they have assigned.

Cur. adv. vult.

The judgment of the Court, on the point on which they took time to consider, was delivered in the following Vacation (Dec. 5), by

BRAMWELL, B.—In this case the Court disposed of several points at the conclusion of the argument, and one only remained for our consideration. In answer to the action the defendant pleaded a deed under the 192nd section of the Bankruptcy Act, 1861, which it was said was binding on the plaintiff, a non-assenting creditor, because it was executed by the requisite majority in number and value of creditors, and complied with the other conditions necessary to give it validity under the Act. The point on which we reserved our judgment was this, that although the deed assigned the debtor's property to a trustee for the benefit of the creditors, yet it contained an

express reservation to the debtor of a right to keep possession of and use the property until he should make default in payment of the composition of 5*s.* in the pound; and, in case of default, the trustee was to apply and administer the estate for the benefit of the creditors as if the debtor had been declared bankrupt. It was objected that this stipulation was in violation of the 7th condition of the 192nd section of the Bankruptcy Act, 1861, which requires "that immediately on the execution of the deed by the debtor, possession of all the property comprised therein be given up to the trustees."

Upon consideration, we have come to the conclusion that the deed is good. That is manifest when it is considered that there is no necessity for the debtor to make any assignment of his property, and, if there need be none, it cannot be said the deed is bad because it gives the creditors a benefit which they would not have had if there had been no assignment at all. The true and sensible construction of the 7th condition is this, that where the deed in terms provides that the debtor's property shall be given up to the trustees, in order to render the deed binding on non-assenting creditors the property must be given up in accordance with such terms. We therefore think the deed good, and our judgment is for the defendant.

Judgment for the defendant.

1865.

Nov. 20.

GRESTY *v.* GIBSON.

A composition deed under the Bankruptcy Act, 1861, made between the debtor of the one part, and all his creditors of the other part, after reciting that the debtor had agreed to pay his said creditors a composition by instalments in satisfaction and discharge of their debts, contained a covenant by the debtor with the several creditors, and with each of them respectively, to pay the composition, in consideration of which the creditors released the debtor from all actions, debts, contracts, &c.—*Held*, that the deed was valid and pleadable in bar to an action by a non-assenting creditor.

DECLARATION on a promissory note.

Plea.—That after action, to wit, on, &c., an indenture was made by and between the defendant and divers of his creditors (so far as material) as follows:—" This indenture, made the 18th May, 1865, between Stephen Gibson, of &c., of the one part, and all the creditors of the said Stephen Gibson, of the other part: Whereas the said Stephen Gibson is indebted unto his said creditors in sums of money which he is unable to pay in full; and it has been agreed that he shall pay to his said creditors a composition of 5*s.* in the pound upon the amount of their several and respective debts, to be accepted by the said creditors in full satisfaction and discharge thereof, such composition to be paid by three instalments, of 2*s.* at the expiration of a calendar month from the date hereof, and 1*s.* 6*d.* at the expiration of four calendar months from the date hereof, and 1*s.* 6*d.* at the expiration of seven calendar months from the date hereof. Now this indenture witnesseth that in consideration of the premises and of the release hereinafter contained, he the said Stephen Gibson doth hereby for himself, his heirs, executors and administrators, covenant and agree with the said several creditors, and with each of them respectively, their and each of their executors, administrators, and assigns respectively, that he, the said Stephen Gibson shall and will pay unto the said creditors respectively, or to their respective executors, administrators, or assigns, the said composition of 5*s.* in the pound upon the amount of their several and respective debts, by three instalments, namely 2*s.* in the pound at the

expiration of one calendar month from the date hereof, 1*s.* 6*d.* in the pound at the expiration of four calendar months from the date hereof, and 1*s.* 6*d.* in the pound at the expiration of seven calendar months from the date hereof. And this indenture further witnesseth that, in consideration of the premises, they the said creditors do, and each and every of them doth, hereby respectively and absolutely release and discharge the said Stephen Gibson, his heirs, executors, administrators and assigns, and his and their estate and effects, from all actions, suits, debts, sum and sums of money, accounts, reckonings, contracts, agreements, promises, bills, notes, judgments, claims and demands whatsoever, at law or in equity, which they or any of them now have or hath against the said Stephen Gibson, his heirs, executors, administrators and assigns: Provided always, that the said release shall not in anywise prejudice or extend, or be construed to extend, to prevent any of the creditors from claiming or realizing any security for any such debt, claim or demand now held by them respectively, or any of them, or from suing any person or persons other than the said Stephen Gibson liable to payment thereof for the recovery thereof, less the amount received by them, or any of them, under these presents, nor in any way prejudice or affect the rights or remedies of any such creditors, except as against the said Stephen Gibson, to which, but for the signing or agreeing to these presents, they might severally have recourse. And it is hereby declared that this indenture is intended to be a deed within the meaning of the Bankruptcy Act, 1861, and is made expressly for and to be applied for and towards the equal benefit of the whole of the creditors of the said Stephen Gibson. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year aforesaid."—Then followed averments

1865.
GRESTY v. GIBSON.

that three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10*l.* and upwards, had in writing assented to and approved of the deed; and that all the statutory conditions necessary to render the deed binding on non-assenting creditors had been complied with.

Demurrer, and joinder therein.

McIntyre, in support of the demurrer (*a*).—The deed is made between the debtor of the one part, and all his creditors of the other part; and the debtor covenants to pay "the said creditors" respectively the composition by three instalments. A non-assenting creditor cannot sue on that covenant. The term "all his creditors" is too general a description to make creditors who have not executed the deed parties to it: *Ex parte Cockburn* (*b*). Then no creditor can sue upon the covenant unless he has executed the deed: *The Chesterfield and Midland Silkstone Colliery Company* v. *Hawkins* (*c*). There is therefore an inequality between the two classes of creditors. [*Bramwell*, B.—In *Benham* v. *Broadhurst* (*d*) the covenant was with the executing creditors individually, so that no other creditors could sue on the deed.]—He also argued that the deed was unreasonable because the consideration for the release was only the covenant to pay the composition money, and not its payment, and that the release extended to causes of

(*a*) He took a preliminary objection that the deed, having been made after action brought, should have been pleaded in bar of the *further maintenance* of the action, citing *Oppenheimer* v. *Grieves*, 7 H. & N. 533. But the Court said that under the 68th section of the Common Law Procedure Act, 1852, the plea need not have a formal commencement, and that under this form of plea the plaintiff would be entitled to his costs.

(*b*) 33 L. J. Bank. 17.

(*c*) 3 H. & C. 677.

(*d*) Id. 472.

action in respect of which the composition would not be payable.

Holker, in support of the plea (*a*).—Any creditor may sue upon the covenant in this deed. *Ex parte Cockburn* proceeded on the ground of inequality. In *The Chesterfield and Midland Silkstone Colliery* v. *Hawkins* the covenant was with the parties who executed the deed and all other creditors bound by it; but no creditors were parties to the deed except those who executed it. [*Martin*, B.—A person may become a party to a deed either by being named or described in it. Here the plaintiff is made a party because he is included in the description "all the creditors" of the debtor.] It is not necessary that a party should be described in the deed by his name of baptism and surname; if he is sufficiently designated that is enough to entitle him to sue for breach of covenant: *The Sunderland Marine Insurance Company* v. *Kearney* (*b*), Addison on Contracts, p. 939, 4th ed. The maxim applies "certum est quod certum reddi potest." [*Pollock*, C. B.—If the parties to a deed were "all the members of a partnership firm on a particular day," that might be a sufficient designation, because there would be no difficulty in ascertaining who were the members of the firm on that day; but can it be easily ascertained who are creditors? A man to whom money is owing may be a creditor in one sense, but if the debtor has a counter claim of larger amount he is not, for he cannot prove his debt.] Creditors holding security are to be reckoned in estimating the requisite majority: *Whittaker* v. *Lowe* (*c*). [*Martin*, B.—Suppose a person sued upon the deed, and the debtor denied that he was a

(*a*) The argument was adjourned and resumed in Hilary Term (Jan. 17).

(*b*) 16 Q. B. 925.

(*c*) *Post*, p. 109.

1865.
GRESTY v. GIBSON

creditor; is it to depend on the result of the trial whether or no he is a party ?] This view is supported by the judgment of *Blackburn*, J., in *Dingwall* v. *Edwards* (*a*), where the parties of the first part were "all and every the creditors and creditor" of the debtor. In *Dewhirst* v. *Jones* (*b*), where "the creditors" were also parties, *Martin*, B., in the course of the argument, said :—"I apprehend that a non-executing creditor might sue on this deed if he averred in the declaration that he was a creditor."—He also argued that there was no inadequacy of consideration for the release, citing *Johnson* v. *Barratt* (*c*), and *Stone* v. *Jellicoe* (*d*); and that the release was confined to debts the subject of the composition, citing *Hazelgrove* v. *House* (*e*).

McIntyre, in reply.—In *Dingwall* v. *Edwards* this point was not raised. *The Sunderland Marine Insurance Company* v. *Kearney* was the case of a policy of insurance by deed poll, and the statute 28 Geo. 3, c. 56, only requires the name or names of one of the persons interested to be inserted therein. The distinction in this respect between a deed poll and a deed inter partes has been long established. The maxim "certum est quod certum reddi potest" is only applicable where there is a defined class, not where it is uncertain and can only be ascertained by the result of an action.

Cur. adv. vult.

The judgment of the Court (*f*) was delivered in Hilary Term, 1866 (Jan. 18), by

POLLOCK, C. B.—This was an action on a promissory

(*a*) 4 B. & S. 739. 750.
(*b*) 3 H. & C. 60.
(*c*) *Ante*, p. 16.
(*d*) 3 H. & C. 263.
(*e*) 35 L. J. Q. B. 1.
(*f*) *Pollock*, C. B., *Martin*, B., *Channell*, B., and *Pigott*, B.

1865.
GRESTY v. GIBSON.

note, and there was a plea of a deed of composition under the Bankruptcy Act, 1861, made between the debtor of the one part, and "*all his creditors*" of the other part, and the debtor covenanted with "*the said several creditors, and with each of them respectively,*" to pay the composition by instalments. The question was, whether a non-assenting creditor could sue on that covenant. We reserved our judgment, and have since found a case of *Lay* v. *Mottram* (*a*), which is in point. That was an action on bills of exchange, to which the defendant pleaded a composition deed, which we cannot distinguish from the present, and the Court of Common Pleas held the plea good, and gave judgment for the defendant. On the authority of that case we think the defendant entitled to judgment on this demurrer.

Judgment for the defendant.

(*a*) 19 C. B. N. S. 479.

FINNEY v. FORWARD and Another.

Nov. 8.

In an action of trover the defendant will not be allowed to interrogate the plaintiff as to the nature of the title by which he claims the goods.

THIS was an action of trover for 133 bales of cotton. The defendant pleaded, not guilty, and not possessed.

After issue joined the defendants took out a summons at Chambers for leave to deliver interrogatories to the plaintiff. The affidavit of the defendants in support of the application stated that the action was brought to recover the value of 133 bales of cotton. In the month of March, 1865, Messrs. Saunders & Son, of Nassau, in the Island of New Providence, consigned to the defendants 133 bales

1865.
FINNEY
v.
FORWARD.

of cotton, accompanying the same with their draft on W. F. De La Rue & Co., London, for 2488*l.* 17*s.* 5*d.*, payable at thirty days after sight. On receipt of such draft the defendants caused the same to be presented to the said W. F. De La Rue & Co. for acceptance, who refused to accept the same. The defendants also caused the said draft to be presented for payment at maturity to the said W. F. De La Rue & Co., but they also refused to pay it; and thereupon the defendants caused the said cotton to be sold, on behalf of the said Messrs. Saunders & Son, in the usual way, for the best prices that could be obtained for the same. It was not until some time after the said cotton had been sold as aforesaid that the defendants had any knowledge whatever that the present plaintiff claimed to have any interest in the same, and the defendants are now in entire ignorance in what way or manner he has any right or title thereto, his name not having been used or referred to by Messrs. Saunders & Son on the occasion of their consigning the cotton as before stated.—There were further affidavits by the defendants and their attorney that they believed that the defendants had a good defence to the action on the merits; that the application was not for the purpose of delay; and that they believed that the defendants would derive material advantage from the discovery.

The interrogatories proposed to be delivered (so far as material) were as follows:—

1. How and when did you become possessed of or entitled to the cotton, the subject of this action, and where and in whose hands was the said cotton when you first became possessed of it?

2. When did you part with the possession of the said cotton, and for what purpose, and under what circumstances, and to whom? Into whose possession did the said cotton come after you parted with it? Did you sell or

pledge or otherwise deal with the said cotton, and, if so, to whom, and how?

3. Do you know William De La Rue? What is he, and what is his business, and how and where carried on? Have you not had dealings with him, and, if so, of what kind? Was not the said cotton in his possession, or in the possession of some person there on his behalf, at Nassau, in March, 1865, or about that time? How and when did it get into his or their possession, and for what purpose, and with what object? Was it not entrusted to him by you or by some person who acted by your authority, or derived or claimed title to it from or through you, in order that it might be sent to Liverpool, or to some other port for sale?

4. Has the said William De La Rue, or any other and what person or persons, advanced you money upon the security of the said cotton? Were you indebted to him or them whilst the said cotton was in his or their possession, for the money so advanced, or for any other money in respect of which he or they claimed to hold the said cotton?

The summons was heard before *Martin*, B., who declined to make an order, whereupon

Crompton Hutton now moved for a rule calling on the plaintiff to shew cause why the defendants should not be at liberty to deliver to him the above mentioned interrogatories.—The 51st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), enables either party, by leave of the Court or a Judge, to deliver to the opposite party interrogatories in writing upon any matter as to which discovery may be sought. The rule in equity is that a party is entitled to a discovery of such facts as relate to his own case, but not to a discovery of the manner

1865.
FINNEY v. FORWARD.

in which his adversary's case is to be established, or to evidence which relates exclusively to his case; but where it appears that the facts relate to the case of the party seeking the discovery, he is entitled to it, although they also relate to his adversary's case. [*Martin*, B.—What is there here which relates to both cases?] The defendants seek to discover under what circumstances the plaintiff parted with the possession of the cotton. [*Martin*, B.—Then they should admit the plaintiff's original title to it. The defendants do not connect the plaintiff in any way with the persons from whom they received the goods. *Channell*, B.—The defendants are in effect seeking to interrogate the plaintiff as to his title.] A plaintiff in ejectment may be interrogated as to his title. [*Martin*, B.—No doubt claimants in ejectment have been compelled to answer interrogatories as to the nature of the title on which they rely, but I have always considered that case an anomaly.] In *Sloate* v. *Rew* (*a*) and *Pearson* v. *Turner* (*b*) the Court of Common Pleas considered that where a person had long been in undisputed possession of the premises sought to be recovered, it was but reasonable that he should be allowed to call for some information as to the title of the claimant. Assuming that the plaintiff is a stranger, the defendants have had possession of the cotton for several months, and what difference in principle is there between that case and the case of a person who has been for several years in possession of lands which are claimed by a perfect stranger? In *Flitcroft* v. *Fletcher* (*c*) *Alderson*, B., said:—"The Court has a general power to require a person who seeks to disturb the possession of another to say by what right he does so." [*Pollock*, C. B.—We do not think it necessary to extend the rule in eject-

(*a*) 14 C. B. N. S. 209. (*b*) 16 C. B. N. S. 157.
(*c*) 11 Exch. 543.

ment to other actions. *Pigott*, B.—The ground of my decision is that the affidavit is insufficient. There is nothing in it which shews that interrogatories ought to be delivered.]

PER CURIAM (*a*).—For the reasons already stated there will be no rule.

Rule refused.

(*a*) *Pollock*, C. B., *Martin*, B., *Channell*, B., and *Pigott*, B.

SMITH and GODDARD *v.* RIDGWAY.

Nov. 23, 25.

A testator, owner in fee of a manufactory on the east side of a street, and also of a manufactory on the west side of the same street, by his will devised all his messuages, lands, tenements hereditaments, and real estate whatsoever and wheresoever, to trustees to sell the same. By a codicil, after devising certain specified freehold and copyhold lands, he devised to A. and W. his manufactory on the west side of the street in the occupation of R. and A., and also other specified messuages, together with the stables, warehouses, outbuildings and all other "appurtenances to the said messuages or tenements, lands and hereditaments belonging or appertaining. The testator, many years before his death, had demised both manufactories to R. and A. at an undivided rent, and they had always used them as one manufactory. That on the east side, which was about half the value of that on the west, could only be used as a separate manufactory if certain reparations were made.—*Held*, that the manufactory on the east side did not pass under the codicil as appurtenant to that on the west

THE first count of the declaration stated that Joseph Mayer, since deceased, being seised in fee of and in a certain manufactory, land, buildings and premises, and also of a certain other manufactory, land, buildings and premises, demised the same to Leonard Abington and the defendant as tenants, to wit from year to year, at the rent of 10*l.* per week, payable weekly by the said L. Abington and the defendant to the said J. Mayer for the same; and that the said L. Abington and the defendant thereupon became, and were, and continued, tenants of the said several manufactories, lands, buildings and premises, upon the terms and at the rent aforesaid; and J. Mayer afterwards and during the said tenancy, to wit, on, &c., died,

1865.
SMITH
v.
RIDGWAY.

having by his last will and testament devised the said first mentioned manufactory, land, buildings and premises to the plaintiffs and the said L. Abington, so being such tenants as aforesaid, and their heirs, in fee; and the defendant and the said L. Abington then, under and by virtue of the said demise and the said will, and not otherwise, continued tenants to the plaintiffs in respect of, that is to say, two undivided third parts of the first mentioned manufactory, land, buildings and premises, and so continued until and at the time of the accruing of the rent hereinafter mentioned, to wit, on the 1st June, 1865, when a large sum of money, to wit, the sum of 266*l.* 13*s.* 4*d.*, became and was due and owing to the plaintiffs for and in respect of, to wit, two-thirds of such portion of the rent aforesaid as ought to be apportioned to the plaintiffs as to the said first mentioned manufactory, land, buildings and premises for, to wit, 102 weeks, which had elapsed since the death of the said J. Mayer, and before this suit, and whilst the plaintiffs were so seised as aforesaid.—Averments of performance of all conditions precedent, &c., to entitle the plaintiffs to maintain the action.—Breach: nonpayment of the said sum so due as aforesaid.

Plea (inter alia).—That the said J. Mayer did not devise the said manufactory, land, building or premises to the plaintiffs and the said L. Abington as in the declaration mentioned.

At the trial, before *Bramwell,* B., at the last Liverpool Summer Assizes, it appeared the plaintiffs sought to recover, as devisees under the will of Joseph Mayer, the sum of 226*l.* 13*s.* 4*d.*, being an apportionment of the rent of an earthenware manufactory on the east side of High Street, Henley, in the county of Stafford. Joseph Mayer was the owner in fee of this manufactory on the east side of High Street, and also of another manufactory on the west side

of High Street. In the year 1848, J. Mayer demised both manufactories to the defendant Ridgway and Leonard Abington, as tenants from year to year, at an undivided rent of 520*l.*, payable weekly.

J. Mayer, by his will, dated the 23rd April, 1860, devised all his "messuages, lands, tenements, hereditaments and real estate whatsoever and wheresoever, and of what nature or tenure soever" unto Leonard Abington, Paul Smith and Thomas Goddard, upon trust to sell the same.

By a codicil, dated the 26th June, 1860, J. Mayer devised as follows:—"I give and devise all my freehold and copyhold messuages, lands, tenements and hereditaments called the Great Eaves Farm, in the occupation of Abner Wedgwood, the Little Eaves Farm and the Hob Hill Farm, in the occupation of William Hodgkiss, the Birch Gate Farm in the occupation of Broadhurst: All my estates, messuages, lands and hereditaments situate at or near Eastwood, in the occupation of Samuel Keeling, William Hambledon and others: my messuages, cottages, *manufactory* and land *on the west side of High Street*, in Henley aforesaid, in the occupation of Ridgway and Abington, and others: my messuage on the east side of High Street, in Henley aforesaid, in the occupation of Mrs. Ridgway, my messuage on the east side of Henley aforesaid, in the occupation of Mrs. Adams, and my five messuages or cottages at the corner of Broom Street, Henley, aforesaid, in the occupation of William Chesters and others, all which said messuages, lands, hereditaments and premises are situate in the parish of Stoke-upon-Trent: Together with the stables, warehouses, outbuildings, yards, gardens and all other rights, members and *appurtenances to the said messuages or tenements, lands and hereditaments belonging or appertaining*, unto Leonard Abington and Abner

1865.
SMITH v. RIDGWAY.

Wedgwood, of the parish of Stoke-upon-Trent, absolutely, as tenants in common."

From the time of the demise until the testator's death, in June, 1860, the defendant, Ridgway, and Abington occupied, as one manufactory, the buildings on the east and west side of High Street. That on the east side had been suffered to go to decay, and could only be used as a separate manufactory by repairing a slip-house and building a new chimney. Its value was about half of that on the west.

It was submitted, on behalf of the defendants, that the plaintiffs had no title, inasmuch as both manufactories vested in the devisees under the codicil. The only question left to the jury was as to the amount of the rent, and they found a verdict for the plaintiffs for the sum claimed, and leave was reserved to the defendant to move to enter a nonsuit.

Quain, in the present Term, obtained a rule nisi accordingly, on the ground that, by the will and codicil of the testator, the property did not vest in the plaintiffs, and they were not entitled to maintain the action; against which

Milward and *Baylis* shewed cause (Nov. 23) (*a*).—The manufactory on the east side of the street, in respect of which the rent is claimed, passed under the general devise in the will to the plaintiffs; and did not pass to the devisees under the codicil, as "belonging or appertaining" to the manufactory on the west side. Although the two buildings had been used as one manufactory, they could, with a slight alteration, be used as separate manufactories. That on the east side being about one half the value of that

(*a*) Before *Pollock*, C. B., *Bramwell*, B., *Channell*, B., and *Pigott*, B.

on the west cannot be considered as appurtenant to it. The codicil contains a specific devise of the manufactory on the west side; then follows a devise of several messuages, together with the stables, &c., and all other "appurtenances to the said messuages," not to the said manufactory, belonging. This is not a question of parcel or no parcel, but one of construction.

The Court then called upon

W. H. Terrell and *Quain*, to support the rule.—By the codicil the testator intended to pass the manufactory *in the occupation* of the defendant and Abington, and the words "on the west side of High Street" are a falsa demonstratio. The question is not one of mere construction, but extrinsic circumstances must be regarded in order to ascertain what is comprehended in the terms of the description: *Goodtitle* d. *Radford* v. *Southern* (*a*). At the time the codicil was made, and for many years before the testator's death, the two buildings had been used as one manufactory. That on the east could not be used separately, without alteration, and it was essential for the commodious enjoyment of that on the west. The word "appurtenances" is sufficient to pass the building on the east side. Under a gift of "the appurtenances" things will pass though not strictly appurtenant. In *Boocher* v. *Samford* (*b*) there was a devise of "a tenement, with the appurtenances, in which H. B. dwelleth, in Ebley," and that was held to pass lands not in Ebley, which for sixty years had been used with the tenement, and were in the occupation of H. B. Again, in *Ongley* v. *Chambers* (*c*), under a devise of the rectory or parsonage of M., with the messuages, lands, &c., thereunto belonging, it was held that lands passed which had been acquired by

(*a*) 1 M. & Sel. 299. (*b*) Cro. Eliz. 113.
(*a*) 1 Bing. 483.

1865.
SMITH v. RIDGWAY.

the owners of the rectory between the fifth year of James the First and 1632, and had always afterwards been occupied with the rectory. The rule of law is that such a construction must be adopted as will give effect to the whole description: *Griffiths* v. *Penson* (*a*). The true principles are enunciated by *Erle*, J., in *Webber* v. *Stanley* (*b*), who said:—"Where there is property in respect of which some of the facts of description are true and some not, there the Court must inquire whether the part of the description which applies to the property is a complete definition of a subject of devise, so that the misdescribing part may be justly regarded as a mistake and rejected as a false demonstration." Here the description of the property is complete, and ought not to be restrained by words of locality. The intention of the testator was specifically to devise by the codicil the buildings which he had, by the will, devised to trustees in general terms.—They also submitted that Abington ought to have been joined as a co-plaintiff, but the plaintiffs' counsel having stated that the point was not raised at the trial, and the case of *Badeley* v. *Vigurs* (*c*) having been referred to, the point was not argued.

Cur. adv. vult.

POLLOCK, C. B., now said.—The question in this case arose on the construction of a will. The testator had a manufactory on the west side, and another on the east side of a street. They were distinct manufactories, and capable of being occupied separately, but for many years they had both been occupied by the same tenants, who had suffered the manufactory on the east side to go to decay, so that it could not be used as a separate manufactory with-

(*a*) 9 Jur. N. S. 385. (*b*) 16 C. B. N. S. 698. 752.
(*c*) 4 E. & B. 71.

out repairing it, and constructing a new chimney. It appeared that the manufactory on the east side was of about half the value of the manufactory on the west side. The testator, by his will, devised to the plaintiffs and one Abington all his messuages, lands and real estate whatsoever and wheresoever, in trust to sell the same, and by a codicil he devised to Abington and one Wedgwood the manufactory and land on the west side, and also certain messuages, together with the stables, warehouses, &c., and "all other appurtenances to the said messuages or tenements, lands and hereditaments belonging or appertaining."

Now, there was no necessary connection between the two manufactories, nor is the case like that of *Ongley* v. *Chambers* (*a*) where it was held that under a devise of a rectory lands passed which were purchased previously to the year 1632, and had been ever since occupied with the rectory.

We are of opinion that this is not a question of parcel or no parcel, but of the construction of the will; and that by the codicil the manufactory on the west side of the street alone passed to the devisees. We think that the manufactory on the east side cannot be considered as "appurtenant" to that on the west. The verdict for the plaintiffs will therefore stand.

Rule discharged.

(*a*) 1 Bing. 483.

1865.

Nov. 22.

HOUGHTON and Others *v.* THE EMPIRE MARINE INSURANCE COMPANY, LIMITED.

Where a vessel is insured "at and from" a foreign port at which she is expected to arrive, the risk attaches when she first arrives at that port in such a seaworthy condition as to be enabled to lie there in safety.

THE declaration stated that by a policy bearing date the 1st day of July, A. D. 1864, and made and executed by the defendants with the plaintiffs, after reciting that it had been proposed to the defendants by the plaintiffs, as well in their own name as for and in the name or names of all and every other person and persons to whom the subject-matter of that policy did, should, or might appertain, in part or in all, to make with the defendants the insurance thereinafter mentioned and described, in consideration of the persons effecting that policy promising to pay to the defendants the sum of 60*l.* as a premium at and after the rate of 40*s.* per cent. for such insurance, the defendants took upon themselves the burthen of such insurance to the amount of 3000*l.*, and promised and agreed with the plaintiffs, the insured, in all respects truly to perform and fulfil the contract contained in the said policy. And it was in the said policy agreed and declared, among other things, that the said insurance should be and was an insurance (lost or not lost) *at and from Havana to Greenock*, upon the body, tackle, apparel, &c., of and in the ship or vessel called the "Urgent," and upon the freight of the said ship or vessel, including all risk of craft and boats to or from the said ship or vessel. And it was also agreed and declared that the subject-matter of the said policy as between the plaintiffs, the insured, and the defendants, so far as concerned the said policy should be and was as follows, that is to say,—upon ship valued at 3000*l.*; and the defendants promised and agreed that the said insurance should commence upon

the said ship or vessel *at and from* as above, and should continue until she had moored at anchor in good safety at her above-mentioned place of destination, and for twenty-four hours after such mooring. Upon the freight, from the time when the goods and merchandize should be laden on board the said ship or vessel as above, and until the said goods and merchandize be discharged and safely landed at as above. And touching the adventures and perils which the defendants were contented to bear and took upon themselves on the voyage so insured as aforesaid, they were of the seas, men of war, fire, enemies, &c., and of all other perils, losses and misfortunes that had or should come to the hurt, detriment, or damage of the aforesaid subject-matter of the said insurance or any part thereof. And it was further declared and agreed that the said ship should be and was warranted free from particular average below water, unless caused by injury to the stern or sternpost, or by fire, grounding or contact with some substance other than water; and that the ship and freight should be and were warranted free from average under 3*l.* per cent., unless general, or the ship were stranded, or sunk, or burnt. And the plaintiffs, from the time of the said insurance, and from thence until and at the time of the loss and damage hereinafter mentioned, were interested in the said ship to the amount of all the monies by them insured thereon. And the said ship, when at Havana as aforesaid, and after the commencement of and during the continuance of the said risk, sustained injury by perils insured against, such injury being caused by grounding and contact with some substance other than water, within the true intent and meaning of the said policy in that behalf, and thereby sustained an average loss and damage exceeding 3*l.* per cent., that is to say, to the amount of 400*l.*—The declaration then averred performance of all conditions, &c., necessary to entitle the plaintiffs to have the said loss and

1865.

HOUGHTON v. EMPIRE MARINE INSURANCE CO.

damage made good to them by the defendants, and alleged as a breach that the defendants refused to compensate the plaintiffs for the same.

Plea (inter alia).—That the said ship did not, when at Havana aforesaid, after the commencement and during the continuance of the said risk, sustain injury by the perils insured against as alleged.—Issue thereon.

The cause was tried, before *Montague Smith*, J., at the last Liverpool Summer Assizes, when the policy set out in the declaration was proved, and the following facts appeared (as stated in the judgment of *Pigott*, B., *post*, p. 52.)—The ship was insured from Nassau to Havana, and went to the latter place with a cargo of coals. The captain proved that he arrived at Havana on the 5th May, 1864, and took a pilot as soon as he got inside the harbour: that he then took a steam tug. His instructions to the pilot were to take him to a clear anchorage. The tug took her up through the harbour and the shipping to a place called the "Regla Shoal," and when past the thick of the shipping above the city the ship began to stir the mud, but was not felt to take ground. The pilot then gave orders to let go the anchor, and the hawser which connected the ship with the tug having broken, the pilot went on shore, and the ship remained in that place. On the next morning the captain attempted to get her head to wind, but could not, and later in the day found that she had sustained damage from the anchor of another ship. She was afterwards got to her place of discharge, nearer the mouth of the harbour than where the shoal was, and at a place pointed out by the purchaser of the cargo.—A chart of the harbour of Havana was also in evidence.

It was agreed by counsel that the only question was, whether the risk had attached at the time when the damage occurred. A verdict was then entered for the plaintiff for 353*l.* 5*s.* 1*d.*, with leave to the defendants to move to enter

a verdict or nonsuit; the Court to be at liberty to draw inferences of fact.

Edward James, in the present Term, obtained a rule nisi accordingly, on the ground that the policy never attached, the vessel not having arrived at Havana within the meaning of the policy; against which

Brett and *Baylis* shewed cause (Nov. 22).—The first question is, what is the true definition of the ship being *at* Havana; secondly, do the facts bring the case within that definition? In nautical phraseology the ship was *at* Havana when she entered the harbour. There is a difference between a ship being *off* a place and *at* a place. Where the ship is *at* a place, the policy does not commence unless she is seaworthy, because in every policy there is an implied condition that the ship shall be seaworthy when the risk attaches. In the case of goods and freight the risk will only attach when the goods are loaded on board. This ship was geographically "at" Havana when the damage occurred. A ship is "at" London when she is in the port of London, although she has to wait her turn to unload. When a ship comes into Dover Roads she is "off" Dover, but when she enters the piers of the harbour she is "at" Dover. [*Martin*, B.—The word "at" may have two meanings. In common parlance a vessel is "at" Dover when she is so near that her passengers would go on shore.] If a ship be insured "at and from" a home port, the risk commences immediately on the execution of the policy. If it be "at and from" some foreign port at which the ship is expected to arrive the risk does not attach unless the ship has arrived at the outward port in such a seaworthy condition as to lie there in safety: *Parmeter* v. *Cousins* (*a*), *Bell* v. *Bell* (*b*), Arnould on Insurance, part 1, chap. ix., p. 388,

(*a*) 2 Camp. 235. (*b*) 2 Camp. 475.

1865.
HOUGHTON v. EMPIRE MARINE INSURANCE CO.

3rd ed. No doubt, under the policy on the outward voyage, the insurance would have continued until the ship had been moored at anchor twenty-four hours; but where an insurance is "at and from" some foreign port, the risk on the homeward voyage attaches although the outward policy is not at an end. In *Motteux* v. *The London Assurance Company* (*a*) Lord *Hardwicke*, C., said there was a case before him upon a trial at Guildhall, and it was then debated whether the words "*at* and *from* Bengal to England" meant the first arrival of the ship at Bengal. And it was agreed the words "first arrival" were implied and always understood in policies. In Phillips on Insurance (*b*) it is laid down that in insurance on a vessel "at" a port, the risk generally commences from the time of its being there. Reference is made to a case of *Patrick* v. *Ludlow* (*c*), in which *Kent*, J., said:—"The true rule on this subject is that *at* and *from*, when applied to a ship includes the period of her stay in the port from the time of her arrival there. But *at* and *from*, when applied to goods, means from the time those goods are put on board the vessel." The learned author proceeds to say (*d*) that "under a policy on a ship *at* and *from* a foreign port, the risk is held not to commence till she is there in safety." In the case of *Seamans* v. *Loring* (*e*), *Story*, J., said:—"The next question is, at what time, if ever, did the policy attach? The insurance is, 'at and from,' &c. What is the true construction of these words in policies must in some measure depend upon the state of things, and the situation of the parties at the time of underwriting the policy. If at that time the vessel be abroad in a foreign port, or expected to arrive at such port in the course of a

(*a*) 1 Atk. 544. 548.
(*b*) Chap. xi., sect. 1. 932, p. 506, 3rd ed.
(*c*) 3 Johns. Cas. N. Y. 10, 14.
(*d*) 934, p. 507, 3rd ed.
(*e*) 1 Mason U. S. 127. 140.

voyage, the policy, by the word 'at,' will attach upon the vessel and cargo from the time of her arrival at such port. If, on the other hand, the vessel has been a long time in such port without reference to any particular voyage, the policy will attach only from the time that preparations are begun to be made with reference to the voyage insured." *Palmer* v. *Marshall* (*a*) is also an authority that under a policy *at* and *from* a place the risk attaches when the vessel is at the place. The word "at" must be construed in a geographical and popular sense.—They also argued that the ship had in fact anchored in the harbour, at a place beyond that of her ultimate discharge, before the damage occurred.

Potter (with whom was *Edward James*), in support of the rule.—The ship did not arrive *at* Havana within the meaning of the policy. The word "at" means at the place where, if the ship had been moored in safety twenty-four hours, the underwriters on an outward policy would be discharged. It is not necessary that the outward policy should have expired; when the ship arrives at her place of mooring the outward and homeward policies overlap, until the expiration of twenty-four hours, when the homeward policy becomes the only security. Although a ship may, in a popular and geographical sense, be said to arrive *at* a place, yet the risk continues until she has reached her place of discharge, and been moored *there* twenty-four hours in safety: *Samuel* v. *The Royal Exchange Assurance Company* (*b*). This ship never arrived at her place of discharge in safety. Where a ship insured to Havana, on arriving was ordered to anchor under the Moro Castle, at the entrance of the harbour, because a frigate was about passing, and after the frigate had passed it was too late to

(*a*) 8 Bing. 79. (*b*) 8 B. & C. 119.

1865.
HOUGHTON v. EMPIRE MARINE INSURANCE CO.

get the ship under way that day; on the next day, in crossing the harbour, and more than twenty-four hours after she had come to anchor under the castle, she struck on a shoal in the harbour, it was held that she had not been moored twenty-four hours in good safety: *Zacharie* v. *The Orleans Insurance Company* (*a*), Phillips on Insurance, chap. XI., sect. II., 968, p. 535. In a note to *Parmeter* v. *Cousins* (*b*) the learned reporter observes that "perhaps it might have been better to have held that policy on the homeward voyage commences at the time when that on the outward voyage expires. Suppose a ship to arrive safe at the outward port, and to be wrecked or captured before she has been moored twenty-four hours in good safety, the assured being *more than ordinarily protected* during this period, may make their election between the underwriters on the outward or on the homeward voyage; and some confusion, if not injustice, may arise in finally adjusting the loss."

Cur. adv. vult.

In Hilary Vacation, 1866 (Feb. 26), the following judgments were delivered.

CHANNELL, B.—This was an action on a valued policy on the ship "Urgent," lost or not lost, at and from Havana to Greenock, and the question for us to determine is, whether or not the risk had attached at the time when the damage occurred. A verdict was entered at the trial for the plaintiff, and a rule has been obtained by the defendants to enter a nonsuit pursuant to leave reserved. The facts are before us on the Judge's notes, and in certain documents admitted in evidence, and we are to be at liberty to draw inferences of fact.

It appears that the "Urgent," having arrived off the

(*a*) 5 Martin. Louis. T. R. 637. (*b*) 2 Camp. 237.

Havana, the captain engaged the services of a steam tug and a pilot for the purpose of taking her to a clear anchorage. She was towed into the harbour past the point where she ultimately discharged her cargo, to a point at the head of the harbour called the Regla Shoal. There she grounded and received damage from the anchor of another ship. In my opinion she was at that time at Havana, and, consequently, the risk under the policy had attached. The damage occurred "at Havana," geographically speaking, and there is nothing which, to my mind, shews that the parties, at the time this policy was underwritten, contemplated any other meaning of the word "at." All the limitation which the law appears ever to have imposed as to the time of commencement of the risk in such a case is that the ship should arrive at the port "at" which she is insured in a state of sufficient repair or seaworthiness to be enabled to be there in safety: see *Parmeter* v. *Cousins* (*a*) and *Bell* v. *Bell* (*b*), in the latter of which cases the ruling of Lord *Ellenborough* at nisi prius was upheld by the Court in banc. Here, however, there seems to be no doubt that the ship was really within the harbour in good safety, and the loss occurred from a peril in the harbour, and in no way from any injuries she had received before her arrival. The ship being insured while "at" Havana is evidently (in the absence of any provision to the contrary) insured all the time she is there, and therefore the risk commences on her first arrival as put by Lord *Hardwicke* in *Motteaux* v. *The London Assurance Company* (*c*). Unless, therefore, we can say that her first arrival at the port is when she casts anchor there instead of when she entered the port, our judgment must be for the plaintiff. In many cases the nature of the port may

(*a*) 2 Camp. 235. (*b*) 2 Camp. 475.
(*c*) 1 Atk. 547.

1865.
HOUGHTON v. EMPIRE MARINE INSURANCE CO.

be such that the two events may be identical. There may be nothing to shew the arrival till the vessel casts anchor, but here we have evidence as to the port of Havana which is sufficient, in my judgment, to shew that the arrival was before casting anchor.

It has been argued that the first arrival, which must be no doubt in good safety, must be identical with the mooring in good safety usually named in outward policies. But I think we cannot construe the terms of one contract by reference to those of another not referred to in it; and it is clear that there is no usage that the durations of the outward and homeward policies should not overlap, because the outward policy usually extends to twenty-four hours after the vessel is moored in good safety. During those twenty-four hours there is no question that there is a double insurance, and therefore I see no ground for saying that the parties contracted subject to any usage that such a policy would not attach until the previous one had determined. If they had wished to make such a condition it might easily have been done, or if, having in view any special dangers, as shoals or the like, within the port of Havana, they had chosen to make the risk date from the vessel being moored in safety, they would have done so, but as it stands it is from her first arrival, which, as a matter of fact, I think to be on her entering the port. My judgment is, therefore, for the plaintiff, that the rule be discharged.

PIGOTT, B.—This was an action on a valued policy on a ship. The risk was thus expressed "at and from Havana to Greenock. (His lordship then stated the facts as above set forth, p. 46.) The verdict was entered for the plaintiffs for 353*l.* 3*s.* 1*d.*, with leave to enter a nonsuit.

The sole question is, whether the policy had attached. I am of opinion that it had.

I agree with the plaintiff's counsel that the language used by the parties ought to have a plain construction, and that, as the ship had arrived geographically within the harbour of Havana and was in safety there before the injury was received, that the risk then commenced.

A policy of insurance is to be construed by the same rules as other contracts, the duty of the Court being to collect the parties' meaning by taking the language employed in a plain and ordinary sense, and not to speculate on some supposed meaning, which they have not expressed. For the defendant it was argued that Havana being an outward port, as regards this ship, the meaning of the words "at and from" such outward port was, that the risk shall commence when the ship has so far performed her outward voyage that nothing remains to determine the outward policy but the effluxion of the twenty-four hours from her arrival; and that, so understood, this policy had not attached, inasmuch as the ship had not arrived at her place of discharge.

But it seems to me that this would be a very artificial construction to adopt, and we have no safe guide to conduct us to it. It might with equal plausibility be argued that the risk "at and from a port" should not commence till the insurance "to" that port ceased, which is at the end of the twenty-four hours, and not at the commencement of them. The answer to both suggestions seems to be that the construction of this contract cannot depend upon the contents of another and distinct one, which is wholly unconnected with it, nor is the Court called upon to know or assume that there is in fact any outward policy in existence.

This view is supported by the authority of Lord *Hardwicke*, in 1 Atkins, p. 548. He mentions a case tried before him at Guildhall, in which he says, "It was doubted whether the words 'at and from Bengal' meant the first

1865.

HOUGHTON v. EMPIRE MARINE INSURANCE CO.

arrival of the ship at Bengal;" and, he adds, "It was agreed the words *first arrival* were implied, and always understood in policies." Now, there can be no question about the sense in which Lord *Hardwicke* uses the words "first arrival," viz., in contradistinction to her being moored in a particular place, or discharging her cargo.

In *Parmeter* v. *Cousins* (*a*) Lord *Hardwicke's* report of the above case is mentioned; and the learned reporter adds, "There seems no doubt that the rule laid down by Lord *Hardwicke*, qualified by the principal case (to which the note is appended), is to be considered as established law upon the subject. The qualification there alluded to is that the ship shall be once in good safety at the port, a matter not in dispute in the present case.

This doctrine, and the authority for it, is to be found in several of the text books on insurance, and may be thus taken to have been long considered as the meaning of those who so word their policies. In Arnould, p. 28, it is the form recommended to parties to be adopted for their advantage in protecting the ship from "the moment of her arrival."

I do not think it necessary to advert to the other question raised, viz., whether in fact this ship had not anchored in the harbour before the damage was sustained, and at a place even further within it than her place of ultimate discharge, nor whether that makes any difference in the case.

In my judgment the plaintiff is entitled to keep his verdict, and the rule should be discharged.

Rule discharged.

(*a*) 2 Camp. 238.

1865.

RICHARDS *v.* HARPER and Another.

Jan. 16.
Nov. 8.

B., being seised in fee of copyhold land, and also of freehold land adjoining, surrendered the copyhold land to G. subject to a deed, whereby G. covenanted with B. that if in working the mines under his freehold land he did any damage to the buildings on G.'s land, he or his assigns should not be compelled at law or in equity to make any compensation to G., and that G. would indemnify him against all claims and demands whatsoever for any such damage. The copyhold land was enfranchised, and afterwards vested in the plaintiff. The freehold land was conveyed to the defendant, who, in working his mines under it, caused damage to the buildings on the plaintiff's land.—*Held*, that the plaintiff was not bound by the covenant.

Aliter, if the land had been freehold: Per *Pollock*, C. B. Dissentientibus, *Martin*, B., *Channell*, B., and *Pigott*, B.

DECLARATION.—For that the plaintiff was possessed of land, with a house, outbuildings and wall erected and standing thereon, called the Ettingshall Parsonage, situate at Ettingshall, in the parish of Sedgley, in the county of Stafford, in his own occupation, and by reason of the premises the plaintiff was entitled to have, and in fact had, the said land, house, and outbuildings and wall supported by the land adjacent and near thereto, and by the soil and minerals under the said land, house, buildings and wall of the plaintiff: Yet the defendants wrongfully, carelessly and improperly, and without leaving any proper or sufficient support in that behalf, made underground excavations, and dug out and removed the said land adjacent and near to the said land, house, outbuildings and wall of the plaintiffs, whereby the same sank and gave way, and the said house, outbuildings, and wall were weakened, dilapidated, cracked and injured, &c. And also for that the defendants so wrongfully, negligently, improperly and unskilfully dug and worked certain mines adjoining land and buildings of the plaintiff, that the said land and buildings of the plaintiff gave way and sank, and the said buildings were weakened, cracked and injured, &c.

Plea to so much of the declaration as relates to injury to the house, outbuildings and wall in the first count, and to the buildings in the second count mentioned.—That before and at the time of the making the demise

1865.
RICHARDS v. HARPER.

hereinafter mentioned, one Benjamin Bickley was seised in his demesne as of fee of certain lands adjoining the land in the declaration mentioned, and in which lands, hereinafter called "freehold lands," there were mines and minerals; and was also before and at the same time seized in his demesne as of fee at the will of the lord of the manor of Sedgley, in the county of Stafford, according to the custom of the said manor, of the plot or parcel of land hereinafter next mentioned, the same then being part and parcel of the said manor, and a customary tenement thereof demised and demiseable by copy of the court rolls of the said manor, by the lord of the said manor, or by his steward of the Court of the said manor for the time being, to any person or persons willing to take the same in fee simple, or otherwise, to hold of the lord of the said manor according to the custom of the said manor. And being so seised he, the said B. Bickley, heretofore, to wit, on the 6th day of May, A. D. 1834, surrendered in the said Court, according to the custom of the said manor, the plot or parcel of land, being the land with a house, outbuildings, and wall erected and standing thereon, of the plaintiff, in the declaration mentioned, unto Charles Girdlestone, his heirs and assigns, at the will of the lord, according to the custom of the said manor, but subject and liable, as expressed in a certain deed made on the said 6th day of May, A. D. 1834, between the said B. Bickley and the said C. Girdlestone, and by which deed it was, inter alia, covenanted and agreed by and between the said B. Bickley and the said C. Girdlestone in manner and form following.—(The plea then stated the covenants, of which the following are alone material to the present question.)—"And it is hereby further declared and agreed by and between the said parties hereto, and the true intent and meaning of them and of these presents is, and are, and the said Charles

Girdlestone doth hereby covenant, promise, declare and agree to and with the said Benjamin Bickley, his heirs, executors, administrators and assigns, that he the said Charles Girdlestone, his heirs or assigns, shall only erect a church or a chapel, one house for the use of the minister, schoolrooms with proper appurtenances thereto belonging, and a stable and gig-house, upon the said plot or parcel of land and hereditaments hereinbefore mentioned to have been surrendered. And that no other buildings of any description nor for any other purpose shall be erected thereupon, anything herein contained to the contrary in anywise notwithstanding. And lastly that in case the said Benjamin Bickley, his heirs or assigns, or his or their lessees or lessee for the time being, shall in working and getting his or their mines and minerals in or out of any lands and heriditaments now belonging to him, the said Benjamin Bickley, do or cause to be done any damage or injury to any erections or buildings authorized by these presents to be erected or built by the said Charles Girdlestone, his heirs or assigns, upon the said plot or parcel of land and hereditaments so coloured green upon the said map or plan, then the said Benjamin Bickley, his heirs, executors, administrators or assigns, shall not, nor shall his or their lessee or lessees thereof, be compelled or compellable either at law or in equity to make any compensation or satisfaction to him the said Charles Girdlestone, his heirs, executors, administrators or assigns, for or in respect of any such injury or damage as shall so happen to be done to the said buildings or erections to be built and erected upon the said plot of land hereby mentioned to have been surrendered, or upon any part or parts thereof. And the said Charles Girdlestone doth hereby, for himself, his heirs, executors, administrators and assigns, covenant and agree with and to the said Benjamin Bickley, his heirs, executors,

1865.
RICHARDS v. HARPER.

administrators and assigns, to fully and effectually indemnify, protect, and save harmless the said Benjamin Bickley, his heirs, executors, administrators, and assigns, and his or their lessees or lessee for the time being, and his and their goods and chattels, lands and tenements, of, from and against any such damage or injury as aforesaid, and from all claims and demands whatsoever to be made or set up by the said Charles Girdlestone, his heirs, executors, administrators or assigns, for all or any such damage or injury arising as aforesaid, or consequential thereof, and from all costs, losses, charges and expenses whatsoever incidental to or otherwise respecting the same."—By virtue of which surrender, and subject to which covenants, the said C. Girdlestone became and was seised of the said tenements with the appurtenances thereof, and being so seised the said tenements with the appurtenances thereof afterwards by divers surrenders, conveyances and assignments became vested in the plaintiff, who thereupon became and was bound by the covenants and stipulations contained in the said deed of the 6th of May, 1834. And the defendants further say that afterwards, to wit, on the 30th day of October, 1841, the said freehold land adjoining the land of the plaintiff and the mines therein were, by a certain deed, &c., sold and conveyed to the defendants, their heirs and assigns, and that the defendants then entered upon the said land and heriditaments, and still are seised and possessed of the same. And the defendants further say that the house, buildings and wall in the first count mentioned, and the buildings in the second count mentioned, were part of the premises erected on the said land in the declaration mentioned, in pursuance of the stipulation in the said deed that the said C. Girdlestone, his heirs and assigns, should only erect thereon a church or chapel and a house for the use of a minister, schoolrooms with proper appurtenances, house for

a master and a stable and gig-house. And the defendants further say that the damage in the declaration mentioned happened solely in consequence of the defendants' working in the said adjoining freehold lands, and not from any working under the said land in the declaration mentioned, nor elsewhere than as aforesaid; and that such adjoining freehold lands are the lands mentioned in the first count of the declaration as adjacent and near to the said land, house, outbuildings and wall of the plaintiff, and are the land which contained the mines in the second count mentioned.

Replication.—And the plaintiff says that the said deed made between the said B. Bickley and the said C. Girdlestone was and is of the tenor and effect following.—The replication then set out the deed verbatim, which recited inter alia the surrender mentioned in the plea, "but subject and liable as is herein expressed." The material covenants appear in the plea, *ante*, p. 56.—The replication then set out the surrender and admittance of C. Girdlestone, which did not mention or refer to the deed of the 5th May, 1834.—Averments: that the surrender was not otherwise subject to the terms of the said deed than as expressed in the said surrender and admittance: that the said deed was not entered upon the Court rolls of the Court of the said manor, nor had the lords of the said manor, or the plaintiff, or her Majesty's Commissioners for building new churches, hereinafter mentioned, or any of them, any notice or knowledge of the said deed at or prior to the date or time of the execution of the deed next hereinafter mentioned: that, after the admittance of the said C. Girdlestone, a deed was made and executed by the said C. Girdlestone and by the lords of the manor of the tenor and effect following.—The replication then set out a deed of enfranchisement executed the 4th June, 1836, and by which C. Girdlestone, under the authority and for the pur-

1865.
EDWARDS
v.
MARPER.

poses of the 58 Geo. 3, c. 45, 59 Geo. 3, c. 134, and 3 Geo. 4, c. 72, gave, granted, conveyed and released, and the lords of the manor of Sedgley granted, conveyed, assigned, surrendered, and enfranchised unto the Commissioners for building new churches the land therein mentioned. The replication then stated that the Commissioners for building new churches thereupon became and were seised in fee of the land in the declaration mentioned: that the church was consecrated, and the plaintiff instituted and inducted into the benefice, and thereupon became the incumbent, and at the time of the committing the grievances &c. was in lawful possession, occupation, and enjoyment of the land in the declaration mentioned, with the house, outbuildings, and wall erected thereon, as such incumbent as aforesaid.—Averments: that the said injuries to the said house, outbuildings, wall and buildings in the said plea pleaded to were caused by the sinking and giving way of the said land in the declaration mentioned, with the said house, outbuildings, wall and buildings erected and standing thereon, as in the decraration mentioned, and that the said sinking and giving way of the said land was not caused by the weight of the said house, outbuildings, wall and buildings, or any of them, but solely by the wrongful acts of the defendants in the declaration mentioned.

Demurrer, and joinder therein.

The case was argued, in Hilary Term, 1865 (Jan. 16), by *Gray* (with whom was *Stavely Hill*) for the defendants, and by *Mellish* (with whom was *Macnamara*) for the plaintiff; and re-argued in the present Term by *Gray* for the defendants, and *Macnamara* for the plaintiff.

Arguments for the defendants.—First, the covenant in the deed of the 6th May, 1834, is one which runs with the land, and binds the assignee. It makes no difference that

the land is copyhold: *Glover* v. *Cope* (a). A grantee of the reversion in copyhold lands is an assignee of the reversion within the meaning of the statute 32 Hen. 8, c. 34: *Whitton* v. *Peacock* (b), 1 Smith's Lead. Cas. 51, 5th ed. The interest of the lord in the soil will not prevent the covenant running with the land, although if he sued for a forfeiture he might not be bound by it. There is no reason why copyhold land should not be dealt with in the same way as freehold. The case of *Keppell* v. *Bailey* (c) is distinguishable. There a Company having constructed a railroad, the lessees of certain iron works covenanted for themselves, their executors, administrators, and assigns, with the Company and their assigns, to procure all the limestone and ironstone used in the works from a particular quarry, and convey it to the works along the railroad, paying a certain toll. The lessees of the iron works assigned their lease to the defendant, who constructed a railroad to another lime quarry, and it was held that the covenant did not run with the land so as to bind him. But there the covenant was not to do anything upon the land assigned. The general rules as to covenants running with the land are, first, that where the covenant extends to a thing in esse, parcel of the demise, as to repair the houses demised, it runs with the land and binds the assignee although not expressly named: secondly, where the covenant is with reference to a thing not in esse at the time of the demise, but afterwards to be done upon the land, as, for instance, to build a wall, it does not run with the land so as to bind the assignee unless he is named: thirdly, where the covenant is not in respect of anything to be done on the land demised, it is merely collateral, and will not bind

(a) 3 Lev. 326; Skinner, 305. (b) 3 Myl. & K. 325.
(c) 2 Myl. & K. 517.

1865.
RICHARDS v. HARPER.

the assignee although named: *Spencer's Case* (*a*).—Secondly, the covenant operated as a grant by Girdlestone to Bickley and his assigns, to work his mines without making any compensation for injury done Girdlestone and his assigns. No particular words are necessary to a grant, it is sufficient if there is an apparent intention to grant. In *Keppell* v. *Bailey* (*b*) the covenant could not operate as a grant. But in *Rowbotham* v. *Wilson* (*c*), where certain lands were enclosed under an Act of Parliament, and the mines allotted to persons other than those to whom the surface was allotted, and the owners of the surface covenanted with the owners of the mines that they might work them without being liable in damages for injury to the surface, it was held that the covenant operated as a grant of a right to disturb the surface. There Lord *Wensleydale* said that if the Commissioners had no power to award the surface to one person and the minerals to another, the award would be void; but an owner of the surface "would be still bound by the deed which he executed, which would operate as a grant of the right to win the coals in such a manner as might injure the superjacent land." [*Martin*, B.—That was the case of a grant of a right to disturb the surface of land by working mines under it.] It makes no difference in principle whether the right granted is to work mines under the land conveyed, or under adjoining land. The right to support of land is not an easement, but one of the ordinary rights of property: *Bonomi* v. *Backhouse* (*d*), and the disturbance of that righ may be properly the subject of a grant.

Arguments for the plaintiff.—First, the plaintiff's land was copyhold, and conveyed by surrender and admission

(*a*) 5 Rep. 16.
(*b*) 2 Myl. & K. 517.
(*c*) 8 H. L. 348.
(*d*) E. B. & E. 622. 642.

on the court rolls, so that, whether this be a covenant or a grant, the land was not bound by it. A copyholder cannot, without the consent of the lord, make a grant which binds the land, by a common law covenant not entered on the court rolls, more especially for the mere benefit of an adjoining landowner. The surrender makes no mention of the deed of the 6th May, 1834, but there is an absolute conveyance of the land. The owner of the mines had no right or power, by a secret deed, to impose a servitude on copyhold land. It is not alleged that there is any custom of the manor which justifies this secret dealing, which materially affects the rights of the lord, especially as regards his fine. The rights of a copyhold tenant as against the lord must be defined by that which appears on the court rolls. "A surrender may be made upon condition; and this is most usually done by way of mortgage. The condition should always immediately follow the surrender, and be carefully inserted in the court rolls:" Watkins on Copyholds, vol. 1, p. 146, 4th ed. In the absence of any special custom to that effect, the lord of a manor cannot be compelled to take a surrender by deed burthened with trusts: *Flack* v. *The Masters &c. of Downing College* (*a*). There *Jervis*, C. J., in delivering judgment, said: "It is true, that upon one construction it may not deprive the lord of a tenant; but it does tend to deprive him of a fine. That is an objection which the lord has a right to urge." In *Peachy* v. *The Duke of Somerset* (*b*) where a copyhold tenant, upon his marriage, surrendered all his copyhold lands to the use of himself for life, with remainder to the first and every other son in tail male; but there was no admittance upon that surrender, Lord *Hardwicke*, C., said, "The lord is not bound to take notice

(*a*) 13 C. B. 945. (*b*) 1 Stra. 446. 454.

1865.
RICHARDS v. HARPER.

of anything but what appears on the court rolls." And in a report of the same case in Prec. in Chanc. p. 573, the Lord Chancellor is said to have been clear, that, as there had been no admittance upon the surrender to the uses of the settlement, the father was to be considered as absolute tenant to the lord. If the copyhold tenant had himself caused this damage to the buildings, it would have been a forfeiture: Com. Dig. Copyhold (M. 3). Watkins on Copyholds, vol. 1, p. 398, 4th ed.; then how can he confer on a stranger the right to do it?—Secondly, the copyhold land was enfranchised after the execution of the deed of the 6th May, 1834, and before the damage was done to the buildings. The enfranchisement changed the tenure from base to free, and all rights, privileges and burthens annexed to the copyholder's estate were abolished: Watkins on Copyholds, vol. 1, p. 451. Assuming, therefore, that the deed of the 6th May, 1834, imposed a servitude on the land when copyhold it was put an end to by the enfranchisement.—Thirdly, this covenant cannot operate as a grant; neither is it a covenant which runs with the land. In Smith's Lead. Cas., vol. 1, p. 74, 5th ed., it is said: "Upon the whole, there appears to be no authority for saying that the *burthen* of a covenant will run with land in any case except that of landlord and tenant; while the opinion of Lord *Holt* in *Brewster* v. *Kitchin* (*a*), that of Lord *Brougham* in *Keppell* v. *Bailey* (*b*), and the reason and convenience of the thing, all militate the other way." [*Martin*, B., referred to *Hill* v. *Tupper* (*c*), and *Rowbotham* v. *Wilson* (*d*).] There the Commissioners were empowered to allot the commonable lands according to the rights of the parties interested in

(*a*) 1 Ld. Raym. 318; Comb. 424. 466; 1 Salk. 198; 5 Mod. 369; 12 Mod. 166; Holt, 175. 668.

(*b*) 2 Myl. & K. 517.

(*c*) 2 H. & C. 141.

(*d*) 8 E. & B. 123; in error, 8 H. L. 348.

by their award it was agreed that the mine owners should not be subject to an action for damage for injury to the surface. The terms of that award differ from the language of this covenant, which can only be construed as a covenant not to sue, which is personal to the covenantee, and not assignable. Besides, in *Robotham* v. *Wilson*, a larger extent of surface was given to the allottee of the surface, as a compensation for the minerals; each of the parties took with full knowledge that the one was to have large powers in working the mines, and that the other was to have the surface subject to that power. Therefore that case is distinguishable, whether the nature of the instrument, the fact of compensation, or the knowledge of the parties of their respective titles, be taken into consideration.

Gray, in reply.—The enfranchisement did not affect the covenant in the deed of the 6th May, 1834. It is not like the case where an easement is extinguished by the dominant and servient tenement becoming united in the same owner. The covenant operated as a grant, and there is no reason why the person who took the estate of the covenantor should not be bound by it. [*Martin*, B., referred to the 3 Geo. 4, c. 72, s. 2.] The deed was substantially a part of the surrender. [*Pollock*, C. B.—It may be that a Court of Equity would give effect to it, but a Court of law cannot.] This is not a question between the lord of the manor and the copyholder, but between the parties to the deed. If a person conveys to another land to which he has no title, and he afterwards acquires a title, the conveyance will operate by way of estoppel.

Cur. adv. vult.

1865.
RICHARDS v. HARPER.

In the following Hilary Vacation (February 26), the judgment of the Court was delivered by

MARTIN, B., who said:—There is a case of *Richards* v. *Harper*, which was argued in Hilary Term, 1865, and again in the following Michaelmas Term.

It involved the question whether the land of the plaintiff, who was an assignee, was bound by a covenant entered into by his assignor with the owner of the adjoining land, that he and his assigns might work the mines beneath it without being compelled to make compensation for any damage done to the buildings on plaintiff's land. At the time the covenant was entered into the plaintiff's land was of copyhold tenure, but it was afterwards enfranchised. A judgment has been prepared in which my brothers *Channell* and *Pigott* concur with me in opinion that, assuming the plaintiff's land to be of freehold tenure, the right claimed by the defendant does not exist, and the plaintiff is entitled to judgment. The Lord Chief Baron dissents from that view, and of opinion that, assuming the plaintiff's land to be of freehold tenure, the plea is good, and the defendant entitled to judgment.

But upon the second argument it was insisted that, in consequence of the plaintiff's land being copyhold, it was not bound by the covenant; and the Lord Chief Baron concurs in that view. There is therefore the unanimous opinion of the Court that the plaintiff is entitled to judgment.

Under these circumstances, we have considered it better not to deliver the judgment which has been prepared; and we pronounce judgment for the plaintiff on the demurrer to the replication.

Judgment for the plaintiff.

1865.

SAVIN *v.* THE HOYLAKE RAILWAY COMPANY. *Nov.* 13.

The plaintiff induced certain persons to become the promoters of a railway Company and co-operate with him in obtaining an act of incorporation, upon an express agreement that he would pay all the costs of obtaining and passing it. The Act passed, and provided that all the costs of obtaining and passing it should be paid by the Company.—*Held*, that the plaintiff was bound by his agreement, and could not recover the costs.

DECLARATION.—That the plaintiff, before the passing of a certain act of parliament, &c. (26 & 27 Vict. c. ccvii.), intituled "An Act for making and maintaining railways from Birkenhead and Poulton-cum-Seacombe to Hoylake, in the county of Chester," bestowed his work and labour of great value, to wit, of the value of 5000*l.*, and paid, laid out and expended divers sums of money, amounting in the whole, to wit, to 3000*l.*, in and about the applying for, obtaining and passing of the said act of parliament, and in and about divers other matters and things and expenses preparatory and relating thereto. And whereas also it was in the said Act provided that all the costs, charges and expenses of and incident to the obtaining and passing of the said Act or otherwise in relation thereto should be paid by the defendants. And the plaintiff says that he has done all things and all things have been done and have happened and exist, and all times have elapsed necessary to entitle the plaintiff to be paid the said costs, charges and expenses by the defendants, but the defendants have not paid the same.

Plea, by way of defence on equitable grounds.—That before the passing of the said Act the plaintiff was desirous of obtaining the passing of the said Act, and of constructing the railway thereby authorized and empowered to be made, in order that certain other railways in which the plaintiff was then interested might be connected with the Birkenhead Docks, which said connection would be effected by the passing of the said Act, and the construction of the railway in the declaration mentioned. And the de-

1865
SAVIN
v.
HOYLAKE
RAILWAY CO.

fendants further say that he, the plaintiff, before the application to Parliament for the said Act, and before any part of the plaintiff's claim in that count mentioned was incurred, induced certain other persons to become the promoters of the Company by the said Act incorporated, and to co-operate with the plaintiff in the applying for and obtaining the passing of the said Act, upon the faith of an express agreement between the plaintiff and the said persons that he, the plaintiff, would bear and pay all the costs, charges and expenses of applying for and obtaining and passing the said Act, and in relation thereto, and that neither the said persons, nor the said Company when incorporated, nor any other persons should be liable to the plaintiff for the payment to him of the same or any part thereof.

Demurrer, and joinder therein.

Littler, in support of the demurrer.—The Company's Act (26 & 27 Vict. c. ccvii., s. 47), having declared that all the costs of obtaining and passing it, or otherwise in relation thereto, shall be paid by the Company, they cannot in any court of law or equity exempt themselves from payment by setting up an agreement between the plaintiff and third persons that they shall not be liable to the plaintiff for those costs. As a general rule, a person cannot, either at law or in equity, avail himself of a contract to which he is not a party. [*Pollock*, C. B.—According to your argument, the Act would entitle a person to sue the Company for work and materials, although at the time he did the one and supplied the other he expressly declined any remuneration. Suppose some person had given a bond to indemnify the Company against these costs, would the Act of Parliament have abrogated it?] The Company were parties to the passing of the Act, and having entered into a solemn engagement with the sanction of the legislature, they are precluded

from denying that the original agreement is rescinded. [*Pigott*, B.—Is the provision in the Act anything more than an authority to pay expenses?] In Cruise Dig. vol. 5, p. 23, s. 49, it is said that "a private act of parliament appears to have been formerly considered as an assurance of so high a nature that, although it was obtained by fraud, yet it could not be relieved against by any of the Courts of law or equity, but only by the power that made it, that is, by Parliament." [*Pollock*, C. B.—These Acts are a mere bargain or contract between the public and the Company.] A contract with the projectors of a Company is not valid unless it be one which might be lawfully made by the Company after its incorporation: *Preston* v. *The Liverpool, Manchester and Newcastle-upon-Tyne Junction Railway Company* (*a*). [*Pollock*, C. B.—Suppose the plaintiff had agreed with the promoters of the Company to do the work for 100*l.*, could he, after the Act passed, have sued them for all the cost beyond that amount?] As the Act overrides the prior agreement, he might. [*Pigott*, B.—In truth, as regards this plaintiff, no costs have been incurred, because he agreed to do the work for nothing.] Then the Act has no meaning, because no person is entitled to these costs except the plaintiff: *Wyatt* v. *The Metropolitan Board of Works* (*b*).

R. E. Turner appeared to support the plea, but was not called upon to argue.

Per CURIAM (*c*).—We are all of opinion that the plea is good, and our judgment will be for the defendant.

Judgment for the defendant.

(*a*) 5 H. L. Cas. 605. (*b*) 11 C. B. N. S. 744.
(*c*) *Pollock*, C. B., *Bramwell*, B., and *Pigott*, B.

1865.

Nov. 25.

A defendant cannot plead to a claim in a declaration for a writ of injunction.

BOOTH *v.* TAYLOR.

THE declaration stated that a certain warehouse was in the possession of J. H. and G. J., as tenants thereof to the plaintiff, the reversion thereof then belonging to the plaintiff, in which said warehouse there of right were and still ought to be divers windows, through which the light and air ought of right to have entered, and still ought to enter into the said warehouse: Yet the defendant prevented and obstructed the light and air from entering through the said windows into the said warehouse by erecting buildings, &c. And the plaintiff also claims a writ of injunction to restrain the defendant from the continuance and repetition of the injuries above complained of, and a committal of other injuries of a like kind relating to the same right.

Plea.—The defendant, for a plea upon equitable grounds to the said claim in the declaration made for a writ of injunction, except so far as the same relates to the committal of other injuries of a like kind relating to the same right, says that the said alleged prevention and obstruction of light and air were originally caused by the erection by the defendant of certain buildings upon certain lands next adjoining the warehouse in the declaration mentioned; and that after the defendant had so erected the said buildings, and before any complaint had been made by the plaintiff in respect thereof, and before the commencement of this suit, the defendant duly and lawfully demised certain portions of the said buildings to certain persons for certain terms therein respectively, which said demises respectively had not, nor had any or either of them, respectively, expired or been otherwise determined at the time of the

commencement of this suit, or from thence hitherto; and that by reason of the premises the defendant is, and from the commencement of this action always has been, unable to prevent a continuance and repetition of the said injuries in the declaration mentioned, and will be unable to obey the said writ of injunction in respect of the said matters in the introductory part of this plea mentioned, so far as relates to the said alleged prevention and obstruction caused by the said portions of the said buildings so demised as aforesaid, without being guilty of a trespass against his said tenants respectively in so doing. And the defendant further says that he has already pulled down and removed, and thereby entirely put an end to, the said prevention and obstruction of light and air so caused as aforesaid by the residue of the said buildings other than the said portions respectively which are so demised as aforesaid.

A summons was taken out at Chambers to strike out the plea, but *Martin*, B., before whom it was heard, refused to make an order; whereupon

T. Barstow obtained a rule to shew cause why the plea should not be struck out; against which

Kemplay now shewed cause.—The question depends on the 79th, 80th and 81st sections of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). In *Bilke* v. *The London, Chatham and Dover Railway Company* (a), the Court refused to allow a demurrer to so much of a declaration as claimed a writ of injunction, but *Bramwell*, B., pointed out that cases might arise in which such a claim would be the subject of demurrer. Then, if such a claim may be demurred to, it may be answered by a plea disclosing

(a) 3 H. & N. 95.

1865.
BOOTH v. TAYLOR.

facts which shew that justice does not require a writ of injunction to issue. [*Channell*, B.—There is a certain class of cases in which an injunction may be claimed; there are others to which it is obviously inapplicable. The judgment that the writ of injunction do issue, does not follow the result of the action, but there must be a special application for the writ upon affidavit.] If the defendant may shew by affidavit that the writ ought not to issue, why should he not do so at an earlier stage by plea? [*Channell*, B.—Ought not the plea to shew beyond all doubt that no injunction could be granted?] The 81st section, which provides that "the writ of injunction do or do not issue, as justice may require," contemplates a disclosure of the facts by plea. [*Pigott*, B.—By the 82nd section a writ of injunction may be applied for at any time before or after judgment. Then how can it be the subject of a plea?] The 81st section assimilates the proceedings to those in an action to obtain a mandamus, which, by the 70th section, are the same as in an ordinary action. [*Pollock*, C. B.—It is impossible to dispose of the matter without knowing the facts. In many cases in which a writ of injunction may issue, there may be reasons why it should not issue.] Unless the plea be allowed the plaintiff will obtain judgment, under 81st section, that the writ do issue. [*Channell*, B.—The Court would not give the judgment, unless the plaintiff asked for it. Why should a question be argued beforehand which may never arise?]

T. Barstow appeared to support the rule, but was not called upon to argue.

POLLOCK, C. B.—In my opinion the claim in the declaration of a writ of injunction is merely a preliminary step to enable the plaintiff to apply for it at the proper time, and

until he makes the application he is not entitled to the judgment of the Court that a writ of injunction do issue. As it is a mere claim which may never be enforced it does not require a plea, and the rule must be absolute.

BRAMWELL, B.—I am of the same opinion, and will only observe that I do not think that anything which I said in the case of *Bilke* v. *The London, Chatham and Dover Railway Company* is in favour of the defendant.

CHANNELL, B.—I am of the same opinion. If the effect of our decision was to deprive the defendant of any substantial answer which he may have to the claim for a writ of injunction, I should be of a different opinion. But I think that the statute only intended to enable a plaintiff to apply for a writ of injunction after he had established his right by a verdict in the action; and that in order to do so it requires him to give notice in his writ of summons and declaration that he wishes to have a writ of injunction. The notice and the application for the writ are distinct proceedings.

PIGOTT, B.—I am of the same opinion. If this plea were allowed, it might give rise to an expensive issue, which need not be disposed of until an injunction is applied for.

Rule absolute.

1865.

Nov. 25.

IN RE THE SHEFFIELD WATERWORKS ACT, 1864,

AND

IN RE THE CLAIM OF GEORGE WROITHLY.

The Court has no jurisdiction to review the Master's taxation of costs under the 67th section of the Sheffield Waterworks Act, 1864, which provides that all costs payable in respect of claims under that Act, shall, in case of difference, be taxed by a Master of a superior Court of law at Westminster, "on the principles and according to the rules, and on payment of the fees observed and paid on taxation and settlement of costs in actions at law."

THIS was a rule calling on the claimant, G. Wroithly to shew cause why the Master should not review his taxation of costs in this matter.

The claimant had recovered damages under the Sheffield Waterworks Act, 1864 (27 & 28 Vict. c. cccxxiv.), which was passed to make provision for the assessment of damage against the Sheffield Waterworks Company in consequence of an inundation caused by the giving way of the embankment of one of the reservoirs of the Company. By sect. 6 the damages were to be assessed by Commissioners, who, by sect. 59, were required within a specified time to give a general certificate thereof. Sect. 65 gave to the general certificate the effect of a judgment recovered against the Company in one of the superior Courts of common law. Sect. 66 prescribed rules as to the mode in which the costs were to be borne, according to the result of the claim.

Sect. 67.—"All such costs as aforesaid shall be due and payable from and by the said Company and any claimant respectively at the expiration of six months after the making of the general certificate; Provided that all such costs shall, in case of difference, be taxed and settled, on production of a certificate of the Commissioners, by a Master of a superior Court of law at Westminster (on the principles and according to the rules and on payment of the fees observed and paid on taxation and settlement of costs in actions at law), if application for such taxation and settlement is made by either party within the last

mentioned period of six months, but in case of difference any such costs shall not be payable at any time unless they are so taxed and settled.

Sect. 68.—"If any costs payable under this Act by the Company or a claimant are not paid within twenty-eight days after demand in writing, the certificate of the Commissioners respecting such costs shall have the effect as against the Company or the claimant of a judgment recovered for the amount of such costs against the Company or the claimant in one of the superior Courts of law at Westminster, as on the day of the date of the general certificate, and afterwards duly registered, but payment of such amount shall have the effect of satisfaction duly entered up upon such judgment."

Sect. 69 provided that in case the damages were not paid within the time specified, judgment might be entered up against the Company in any of the superior Courts of law at Westminster, and a writ of execution issued. Sect. 70 contained a similar provision in case of the nonpayment of costs.

The Commissioners had granted the claimant a general certificate for damages, and also a certificate for costs. The costs were taxed by a Master of this Court, but the Company, being dissatisfied with the taxation, took out a summons at Chambers to review it; the summons was heard before *Martin*, B., who declined to make an order, whereupon the present rule was obtained; against which

Manisty (*Shepherd* with him) shewed cause.—The Court has no jurisdiction to review the taxation. The costs are payable by virtue of the certificate of the Commissioners; the Act only enables the claimant to enforce it by entering up judgment and issuing execution in any of the superior Courts of law at Westminster.

1865.

IN RE SHEFFIELD WATERWORKS ACT, 1864.

The Court then called on

Pickering, Mellish and *Quain*, to support the rule.—The Master acts as an officer of the Court, and not as an arbitrator. The statute has imposed on him the duty, in case of difference, of taxing the costs, and he cannot, like an arbitrator, refuse to take upon himself the burthen of the reference. The 67th section requires him to tax the costs on the principles and according to the rules, and on payment of the fees observed and paid on the taxation and settlement of costs in actions at law." That is not merely a guide to the Master in the performance of his duty, but it assimilates the taxation to the taxation of costs in an action at law. [*Pollock*, C. B.—The Court gives costs either upon a rule or in an action, so that it is cognizant of the proceedings, but here the costs are given by the Commissioners, and the Court has no means of knowing what took place before.] Taxation "according to the rules in actions at law," necessarily implies that it shall be subject to the control of the Court. If the Master refused to tax, he might be compelled by mandamus. Or suppose he exceeded his duty, that might be rectified by a rule to review his taxation, or, if it be treated as an award, by a motion to set it aside. [*Pollock*, C. B.—It is not an award, but in the nature of a valuation.] Either party may apply to any Master of a superior Court, but if the Masters took different views, who is to determine which is right? The Commissioners cannot, because by the 64th section their powers and duties have ceased. There is an express provision that the proceedings and acts of the Commissioners shall not be liable to be interfered with by any Court of law or equity: sect. 60: but there is no such provision as to the Master's taxation. [*Channell*, B.—The claimant gets his costs by the certificate of the Com-

missioners, which has the effect of a judgment recovered against the Company, sect. 68.] The case of *Ross* v. *The York, Newcastle and Berwick Railway Company* (a) arose on the 52nd section of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), the language of which differs from the 67th section of the Sheffield Waterworks Act, 1864.

POLLOCK, C. B.—We are all of opinion that the rule must be discharged. It appears to me that if the legislature had intended that we should review this taxation of costs in a matter wholly out of our jurisdiction, they would have expressly said that the taxation shall be reviewed by a superior Court of law. But they have not done so, and I think that if we were to interfere we should be taking upon ourselves a jurisdiction not intended to be conferred upon us.

BRAMWELL, B.—I am of the same opinion. Those who contend that we have the power and authority which they call upon us to exercise, ought to give some reason for our exercising it. Now, I think there are two reasons to the contrary. One is, that in the ordinary case of the costs of an action it is the Court who awards them, and the Master or officer of the Court fixes their amount; and therefore there is an appeal from the officer to whom the Court delegated its authority. But in proceedings under this act of parliament no such reasoning will apply; for the costs are in no sense awarded by the Court. Another reason is that, by the 67th section, the costs, in case of difference, are to be taxed and settled "by a Master of a superior Court of law at Westminster," that is, not by a Master of any particular Court, but by any one of the

(a) 5 D. & L. 695.

1865.

IN RE SHEFFIELD WATERWORKS ACT, 1864.

Masters of any of the superior Courts. It is clear that any Master of this Court might say that he had not time to attend to the matter, and that application must be made to a Master of another Court. That, again, shews that this Court has no power to review the taxation, and that it is not as a mere officer of the Court, but as one of fifteen designated persons, that the statute has imposed this duty on the Master. An appeal will no more lie because the Master who has taxed the costs happens to be a Master of this Court, than it would lie if he happened to be a Master of any other Court. It is clear, therefore, that we have no authority in this case to review the taxation.

CHANNELL, B., and PIGOTT, B., concurred.

Rule discharged.

Nov. 25.

DRAKE *v.* PYWELL.

To a declaration for breaking and entering the plaintiff's close and pulling down a wall, the defendant pleaded that B. was seised in fee of the land in which &c., in trust to pay the rents and profits to the defendant's wife for her life; and that whilst the defendant and his wife were in occupation of the land, B., in breach of trust, conveyed the land in fee to the plaintiff, who had notice of the breach of trust, and that afterwards, and whilst the plaintiff and his wife were in such occupation, the defendant wrongfully built the wall which encumbered the land, and prevented the defendant and his wife from enjoying it; wherefore the defendant, in his own right, and by direction of his wife, pulled it down.—*Held*, that the plea afforded no defence on equitable grounds to the action.

DECLARATION.—That the defendant, heretofore, on divers days and times, broke and entered a certain close of the plaintiff, situate, &c., and then and there broke, pulled down, prostrated and destroyed a certain wall of the plaintiff, which was then being built and erected by the plaintiff in and upon the said close of the plaintiff, and then and there threw down, placed and deposited large quantities of bricks, lime, mortar and other materials in and upon

the said close of the plaintiff, and thereby greatly incumbered the said close, and hindered and prevented the plaintiff from having the use and enjoyment of the same, &c.

Plea upon equitable grounds.—That before the time of the committing of the trespasses in the declaration mentioned, one T. Brown was seised in his demesne as of fee of the said land in which, &c., in trust to pay the rents and profits arising therefrom unto Grace, the wife of the defendant, for and during the term of her natural life, for her sole and separate use, free from the control, debts and engagements of the defendant, her husband, and so that, during her coverture, she should have no present power to alien or anticipate the said rents and profits, or any part thereof; and after her death upon certain other trusts, all which trusts the said T. Brown had accepted and had entered upon. And the defendant says that afterwards, and whilst the defendant and Grace, his said wife, were in occupation of the said land, and in enjoyment of the profit of and in the same, with the assent of the said T. Brown, as such trustee as aforesaid, and before the time when, &c., the said T. Brown committed a breach of the said trusts, and wrongfully, illegally and improperly, and without the consent or knowledge of the defendant, or his said wife, conveyed and assigned the said land in which, &c., to the plaintiff in fee simple. And the defendant says that always, before and at the time of the said conveyance, and ever afterwards, the plaintiff had full notice of the premises and of the said breach of trust, and joined with the said J. Brown in committing the same, and persuaded and induced him to commit the same, and to make such conveyance as aforesaid. And the defendant says that at the time of the said breach of trust his said wife, Grace, was and still is alive, and that in equity the said land in which, &c.,

1865.
DRAKE v. PIWELL.

belonged to, and still belongs to his said wife, Grace, and to him, as her husband. And the defendant further says after such conveyance and breach of trust as aforesaid, and whilst the defendant and his wife, Grace, were in such occupation and enjoyment, and before the time when, &c., the plaintiff wrongfully and improperly built a wall on the said land in which, &c., which incumbered the same, and prevented the defendant and his said wife, Grace, from enjoying the same; wherefore the defendant, in his own right, and by the permission and direction of his said wife, Grace, committed the acts in the declaration mentioned, doing no more damage to the plaintiff than was necessary in order that he or his said wife might enjoy the said land in which, &c., which are the trespasses in the declaration mentioned.

Demurrer, and joinder therein.

C. Wood argued in support of the demurrer (*a*).—The plea affords no defence in equity. The fee simple in the land was conveyed to the plaintiff by the trustee, and if a breach of trust has been committed the defendant should apply to a Court of equity to set aside the deed. In *Scott* v. *Colburn* (*b*) Sir J. *Romilly*, M.R., said that, assuming the deed "to be fraudulent, still a bill must be filed to set it aside, and therefore, in this suit, I am bound to assume its validity." [*Pollock*, C. B.—If a trustee illegally conveys trust property, the person to whom it is conveyed, with notice of the trust, becomes a trustee.] In this case a Court of equity would not grant a perpetual injunction without first setting aside the deed and taking an account of the rents and profits. If the plea had said that the deed was

(*a*) In Trinity Term, 1865 (June 7). Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.

(*b*) 26 Beav. 276.

void it might have afforded a defence; but it states that the fee simple passed under it. The legal owner having built a wall upon the land, the defendant is not justified in knocking it down merely because his wife is entitled for life to the rents and profits of the land. It may be that the wall was built in pursuance of the trusts of the settlement. If the plaintiff has wrongfully obtained possession of the trust property and built upon it, the cestui que trust has the same remedy in a Court of equity against him as against the trustee: *Rolfe* v. *Gregory* (*a*); but the defendant has no right to obtain redress by his own act: *Hyde* v. *Graham* (*b*).

Crompton, contrà.—The plea affords a good equitable defence. The trustee having wrongfully conveyed the legal estate in the land to the plaintiff, with notice of the trust, he became in equity a trustee for the defendant's wife. If an action be brought by a trustee against his cestui que trust a Court of equity will restrain it. [*Martin*, B.—In the case of a cestui que trust for life and one in remainder, if the trustee erects some building on the land, which is an improvement to it, but the cestui que trust for life prefers it in its unimproved state, has he a right to knock it down?] Here the action is for entering on the land, and the destroying the wall is matter of aggravation. In Story Equity Jurisprudence, § 533, vol. 1, p. 615, 6th ed., it is said "that trusts are enforced, not only against those persons who are rightfully possessed of trust property as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust." The defendant was in possession by permission of the trustee, and in right of his possession pulled down the wall. [*Channell*, B.—Suppose the wall had been built

(*a*) 34 L. J. Chan. 274. (*b*) 1 H. & C. 593.

1865.
DRAKE v. PYWELL.

by the trustee, would the defendant have been justified in pulling it down?] This case is different, because the plaintiff, having acquired the property by a breach of trust, a Court of equity would restrain him from interfering with it. There is no necessity to set aside the deed; a Court of equity would stay the action, and appoint a new trustee. In those cases in which Courts of law have held equitable pleas bad, because they could not do complete justice between the parties, there have been equities on both sides, and it is a fundamental principle that he who asks for equity must do equity.

C. Wood, in reply.—The plea does not shew that the defendant has any right to the possession of the land, but only that his wife is entitled to the rents and profits of it. He was a mere tenant at will to the trustee, and the conveyance to the plaintiff, although a breach of trust, determined the tenancy. [*Pollock*, C. B.—The defendant's wife, being entitled to the rents and profits, had the option of being in possession, and if the trustee had brought ejectment, a Court of equity would have stayed the action.]

Cur. adv. vult.

BRAMWELL, B., now said.—The question in this case is whether a plea on equitable grounds is good. The declaration states that the defendant broke and entered the plaintiff's close and pulled down a wall. The defendant pleaded that one Brown was seised in fee of the land in trust for the defendant's wife for her life, and that, whilst the defendant and his wife were in occupation of the land, the trustee, with the knowledge of the plaintiff, committed a breach of the trust, and illegally conveyed the land to the plaintiff, who built a wall upon it, wherefore the defendant

in his own right, and by the direction of his wife, pulled it down.

We think this a bad plea; because, although the trustee may have committed a breach of trust in conveying the land to the plaintiff, the building the wall on the land, notwithstanding the defendant objected to it, may have been a benefit to the estate, and it may be that the cestui que trust in remainder would rather have the wall standing than demolished.

There are other considerations which tend to shew that the plea is bad. It would seem that the proper course would be to file a bill in equity against the trustee and the plaintiff for a reconveyance of the land, when, if the defendant and his wife have sustained any injury by the plaintiff building the wall, compensation might be awarded to them. But, however that may be, we think that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

STUBLEY, Administrator of MARY STUBLEY, deceased, v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Nov. 18.

THE declaration stated that the defendants, at the time of the grievances, &c., were possessed of a railway which

The defendants' railway crossed on a level a public footway; and on each side of the line were swing-gates through which passengers entered. At one of these gates the view up and down the line was obstructed by the piers of a railway bridge which crossed it, but near the line there was a clear view of 300 yards in each direction. A woman who approached the line by that gate waited until a luggage train had passed, and immediately afterwards proceeded to cross the line, when a person on the other side twice called out to her, but, being deaf, she did not hear, when an express train, which the luggage train had prevented her from seeing, knocked her down and killed her. Thirty-six passenger trains passed along the line daily, besides luggage trains. No person was stationed at the crossing to warn passengers of danger, but caution boards were placed there.—*Held*, that there was no evidence for the jury of negligence on the part of the defendants.

1865.
STUBLEY v. LONDON AND NORTH WESTERN RAILWAY CO.

crossed on the level thereof a public highway, and were also possessed of an engine and train of carriages then travelling upon and along the said railway under the care and management of their servants: Yet the defendants did not take reasonable or proper care, or use reasonable and proper means for the protection of persons using the said highway where it was so crossed by the said railway, and by their servants drove and managed the said engine and train of carriages upon and along the said railway in a careless and negligent manner, whereby the said Mary Stubley, who was then lawfully using the said highway where it was so crossed by the railway, was knocked down by the engine and train of carriages, and thereby wounded and injured, and by reason of the wounds and injuries thereby occasioned to her, afterwards and within twelve calendar months next before this suit, died, &c.

Plea (inter alia), not guilty.—Issue thereon.

At the trial, before *Blackburn*, J., at the last Leeds Summer Assizes, the following facts appeared.—Near the Butley station, between Leeds and Dewsbury, the defendants' railway crosses on a level a public footway, leading from Butley to Morley. This footway was much frequented in consequence of there being a large mill in the neighbourhood. On each side of the railway, at a few yards from the line, was a swing gate, through which foot passengers passed in crossing the railway. A person standing at the gate on the Batley side of the railway could not see more than thirty yards along the line in the direction of Leeds, the view being obstructed by the stone pier of a bridge by which the West Yorkshire Railway is carried across the defendants' railway; but about nine feet from the rails there is a clear view of nearly 300 yards up and down the line in either direction.

On the morning of the 9th December, 1864, the plain-

tiff's wife, who was employed at the mill, was proceeding to her work. She passed through the gate on the Butley side of the railway, and waited until a long luggage train from Dewsbury to Leeds had passed. As soon as it had passed a person at the gate on the Morley side of the railway saw her begin to cross the line. He twice called out to her, and held up his hands, but, being deaf, and looking down on the ground, she neither heard nor saw him, and proceeded to cross the line, when an express train from Leeds, which the luggage train had prevented her from seeing, knocked her down and killed her. Thirty-six passenger trains passed along the line daily, besides luggage trains. No person was stationed at the crossing to warn foot passengers that trains were due; but boards were placed on each side of the line with "Beware of the Engine" upon them.

At the close of the plaintiff's case, the defendants' counsel submitted that there was no evidence for the jury of negligence on the part of the defendants. The plaintiff's counsel having cited *Bilbee* v. *The London, Brighton and South Coast Railway Company* (*a*), and the ruling of *Pollock*, C. B., in *Stapley* v. *The London, Brighton and South Coast Railway Company* (*b*), the learned Judge reserved leave to the defendants to move to enter a nonsuit, if there was no evidence on which the jury could reasonably find negligence, and subject to that he told the jury to assume, for the purpose of the day, that the law casts on the Company the duty of taking all reasonable precautions for the purpose of protecting passengers from risk, including that of keeping watchmen to warn passengers of the approach of a train, if the nature of the traffic and the place made that a reasonably necessary precaution; but they must not suppose that the defendants were bound to build a foot-bridge, the legislature having authorized a

(*a*) 18 C. B. N. S. 584. (*b*) *Post*, p. 93.

1865.
STUBLEY v. LONDON AND NORTH WESTERN RAILWAY CO.

level crossing: and his lordship left it to the jury to say: First, was there negligence on the part of the Company occasioning the accident: Secondly, could the deceased, by reasonable care on her part, have avoided it. The jury found a verdict for the plaintiff, stating that they were of opinion that at this crossing there ought to be reasonable precautions taken by the Company beyond what they had taken.

Overend, in the present Term, obtained a rule nisi to enter a nonsuit pursuant to the leave reserved; against which

Manisty and *Kemplay* now shewed cause.—There was evidence for the jury of negligence on the part of the defendants. Although the legislature has authorized them to cross a public footway on a level, that does not exempt them from the common law liability of taking reasonable precautions to enable the public to use the footway with safety. Persons using a public highway with horses and carriages are bound to drive at a reasonable pace so as not to endanger human life. If a watchman had been stationed at the gate the accident would not have happened. In *Bilbee* v. *The London, Brighton and South Coast Railway Company* (*a*) the railway crossed on a level a public carriage and footway at a spot which, from the fact of there being a considerable curve in the line, and a bridge near, trains coming in one direction were not seen until very close, was particularly dangerous. There were gates across the carriage way, which were kept locked, but the footway was protected only by a swing-gate on either side, no person being there to caution people passing. The plaintiff, while using the footway, was knocked down by a passing train and injured; and it was held that it was

(*a*) 18 C. B. N. S. 584.

properly left to the jury to say whether or not the Company had been guilty of negligence. [*Bramwell*, B.—That case is different from this, inasmuch as there the curve in the line prevented a person crossing it from seeing a train approaching until he was actually upon the rails.] Here the facts proved shew that there was such danger to persons crossing the line as required the exercise of great caution on the part of the Company. The Court cannot say, as a matter of law, when extraordinary precautions are necessary, and it must in each case be a question for the jury.—They also referred to the ruling of *Erle*, J., in *Ford* v. *The London and South Western Railway Company* (*a*).

Overend (*J. B. Maule* with him) in support of the rule. —There was no reasonable evidence of negligence on the part of the Company. In *Bilbee* v. *The London, Brighton and South Coast Railway Company*, the railway crossed a public carriage road on a level, and therefore the Company was bound, by the 8 & 9 Vict. c. 20, s. 47, to have a person stationed at the gates; but they neglected the duty imposed upon them by the act of parliament. Here there was no obligation on the Company to have a person stationed at the footway. Where there is danger in crossing a railway it is the duty of persons to exercise greater caution. The principle of the decision in *Wilkinson* v. *Fairrie* (*b*) governs this case. The Company used all necessary precautions, and the accident was caused by the negligence of the deceased in crossing immediately after the luggage train had passed, without waiting to see if any other train was approaching—He was then stopped by the Court.

(*a*) 2 F. & F. 730. (*b*) 1 H. & C. 633.

1865.
STUBLEY v LONDON AND NORTH WESTERN RAILWAY CO.

POLLOCK, C. B.—I am of opinion that the rule ought to be absolute. I can see no evidence of negligence on the part of the defendants. The railway appears to be constructed in a straight line for hundreds of yards on either side, and persons who are careful to ascertain that no train is approaching have ample time to cross in safety. The legislature saw no mischief in allowing the railway to cross the footway on a level; and in my opinion there are no circumstances which rendered it necessary to have a watchman at the spot, or to take any other precautions. It appears to me that there was no evidence of negligence, and that a nonsuit ought to be entered.

BRAMWELL, B.—I am of the same opinion. It is easy to use the general expression "negligence," but it is difficult to see in what it here consists. Mr. *Manisty* says that the Company ought to have had some person stationed at the spot to warn people of danger in crossing the line, but let us look at the facts and see whether there was any necessity for placing a person there. It is said that anyone standing at the swing gate on the Batley side of the line cannot see a train until it comes within thirty yards of the crossing. But at that gate he does not put his foot upon the line of the railway, and when he proceeds further and gets on a level with the line, he can see 300 yards in each direction. Now 300 yards are a little more than the sixth of a mile, and a train going thirty miles an hour would take twenty seconds to pass over the distance; so that a person walking at an ordinary pace might cross the railway three or four times before the train reached him. Then was it necessary that a person should have been there to warn the deceased of the approach of a train, when, if she had used proper precaution, she might herself have seen it?

Then it is said that danger arises from trains passing each other at this point, but is it unreasonable that they should do so? That is not contended; but it is urged that there ought to be some person to warn passengers. Warn them of what? Of that which every person accustomed to cross a carriage road must know, viz., that if he crosses immediately after a carriage has passed on his side of the road, he takes the chance of finding another carriage coming the other way on the other side of the road. Is a watchman to be placed, not to tell people what they do not know, but what, from their carelessness or heedlessness, they forget at the moment when it ought to be remembered? It would be absurd that the community at large, by reason of their own carelessness, should impose such a duty upon railway Companies. If that be necessary here, it must be done elsewhere, and the consequence will be that at every part of a railway, road or canal where peoples' improvidence might imperil them, a person must be stationed to warn them of danger instead of leaving them to exercise their own common sense. In my judgment that would be most mischievous. I am inclined to think that all rules, regulations and provisions made for the purpose of taking care of people when they ought to take care of themselves are positively mischievous. That may be illustrated in this way. It is assumed that a watchman would know the times when trains passed across the footway; but are there to be no special trains, no engines running by themselves at uncertain times, of which he could give no warning? A passenger trusting to his knowledge would go on, and run into danger, and then say, "I relied on the watchman;" so that the very precaution used for the purpose of saving him from danger would lead him into it. It is much better to let people rely upon themselves.

The deceased, supposing it was safe to cross the line

1865.
STUBLEY v. LONDON AND NORTH WESTERN RAILWAY CO.

when the luggage train had passed, went on without looking to see whether a train was coming in the other direction. It is manifest to me that she brought this calamity on herself, and that there was not only no negligence on the part of the Company, but that if the deceased had used ordinary caution she might have prevented the accident.

With respect to the case of *Bilbee* v. *The London, Brighton and South Coast Railway Company* I think it cannot be treated as an authority in point. I do not say it was not rightly decided, but the Lord Chief Justice seems to have intended to guard against its being cited as an authority for any other case. I can readily understand that if a railway is made with a curve so abrupt that a person desirous of crossing the line cannot see an approaching train, or if a tunnel be so constructed that he cannot tell when a train is coming out, and consequently might stop for ever without knowing whether it was safe to cross the line, the Company would be bound to exercise great care in protecting against danger. That is all that was decided in *Bilbee* v. *The London, Brighton and South Coast Railway Company.* Here it is manifest that if the deceased had waited she would have had ample opportunity of seeing the train on the other side of the line. There is, then, no evidence of negligence on the part of the defendants, and obvious negligence on the part of the deceased, and therefore the rule must be absolute.

CHANNELL, B.—I am also of opinion that the rule ought to be absolute. At the trial the attention of the learned Judge was called to the recent case of *Bilbee* v. *The London, Brighton and South Coast Railway Company;* and my only doubt was whether our decision might not appear to conflict with the decision in that case. But it seems to me, on the grounds stated by my brother *Cramwell,* that

that decision does not conclude this case; for it does not lay down any distinct principle which we can apply here. The question is, was there any evidence of negligence on the part of the Company which ought to have been submitted to the jury? I do not inquire whether, if there was negligence on the part of the Company, there was contributory negligence on the part of the deceased; because my judgment proceeds on the ground that there was no negligence on the part of the Company. The learned Judge (probably pressed with the authority of *Bilbee* v. *The London, Brighton and South Coast Railway Company*, which in some of its circumstances resembles this case) left it to the jury to say whether there was negligence on the part of the Company, but at the same time carefully abstained from laying down any general rule, and told the jury to assume, for the purpose of the day, that the law cast on the Company the duty of taking all reasonable precautions for the purpose of protecting passengers from risk.

It appears that warning boards were placed on each side of the line. No complaint is made of the want of a whistle, nor is it suggested that the train, although an express train, was going at an improper speed. Under these circumstances, it seems to me that there is no evidence for the jury of negligence. I think that a passenger who uses a footway which a railway crosses on a level is bound to exercise ordinary and reasonable care, and to look up and down the line for the purpose of ascertaining whether he can cross it with safety. I do not doubt that if the luggage train had not intervened, the deceased would have seen the express train. But she attempted to cross the line immediately the luggage train had passed, and it does not seem to have occurred to her that possibly another train might be coming on the opposite side of the line. It is argued that

1865.
STUBLEY v. LONDON AND NORTH WESTERN RAILWAY CO.

there was a want of precaution in not having a watchman stationed at the place. But there was a person on the other side of the line who twice called out to the deceased; and what more could a watchman have done? The Lord Chief Justice, in his judgment in *Bilbee* v. *The London, Brighton and South Coast Railway Company*, points out that there were circumstances which rendered it proper that the question of negligence should be left to the jury, but here no such circumstances exist.

PIGOTT, B.—I am of the same opinion. The learned Judge seems to have taken great care in summing up and leaving the questions to the jury, and I should be sorry to disturb the verdict if there was any reasonable evidence of negligence on the part of the defendants, but I can find none.

The case of *Bilbee* v. *The London, Brighton and South Coast Railway Company* depends on its own circumstances. It is suggested that a watchman should have been stationed at the place, but, looking at what a watchman's duty would have been, he could not have done more than the only witness of the accident. He saw the deceased begin to cross the line, and twice called out to her, but she was deaf, and stepped into danger, and so met with her death. I cannot help saying that she thoughtlessly put herself in the condition of taking her chance of a train approaching. I do not say that in no case is a railway Company bound to place a watchman where the railway crosses a footway on the level; but to require it the circumstances must be exceptional. In cases like this, if it were loosely left to the jury whether there ought not to have been a watchman, there would be no limit to the liability of railway Companies; they must have a watchman on each side of the line, and the watchman must not only call out, but take

hold of some people and stop them, for in the case of a deaf person calling out would be of no use. I give my judgment in favour of the defendants, because I can see no evidence whatever of negligence on their part.

Rule absolute.

1865.

STUBLEY v. LONDON AND NORTH WESTERN RAILWAY CO.

STAPLEY and Another, Executors of JOHN STAPLEY, deceased, *v.* THE LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY.

Nov. 25.

THE declaration stated that the defendants are the Company incorporated by an Act passed in the session of parliament, &c. (9 & 10 Vict. c. cclxxxiii.). And after said Act came into operation, and before and at the time of the committing of the grievance hereinafter mentioned, the defendants were the proprietors of a certain railway in that Act mentioned, to wit, a railway from Brighton to Chichester, and were then possessed of the said railway, and were then also possessed of divers carriages and locomotive engines then used by them for the purpose of carrying passengers and goods along the said railway, for reward to the defendants; and the said railway crossed a certain highway on a level at a place near to a certain station of the defendants used by them for such passengers as aforesaid, called the Portslade station, and to which station there was an approach from the said highway across the said railway, used by such passengers as aforesaid with the knowledge and leave of the defendants, and the defendants and the said railway were then subject to the provisions relating to railways crossing highways on a level, contained

The defendants' railway intersected a public foot and carriage way upon the level close to a station on the defendant's line. At the place of intersection swing carriage gates opened both ways, and there was also a swivel gate on each side of the line for persons on foot. The plaintiff, a return-ticket holder, while crossing the line at this place to reach the passenger station, was killed by an overdue express. At the time of the accident one of the swing gates was partially open and there was no gatekeeper.—*Held*, that this circumstance (which was in contravention of the provisions by statute and by the defendant's rules for the protection of carriage traffic along the road) constituted an invitation to the plaintiff to cross the line, and evidence for the jury of the defendants' negligence.

1865.

STAPLEY v. LONDON, BRIGHTON AND SOUTH COAST RAILWAY CO.

in or referred to by the said Act and the Acts incorporated therewith. And the defendants, by their servants, then so negligently, and unskilfully, managed the said railway and certain gates, erected by the defendants, as required by the said statutes, on the said highway where the same was so crossed by the said railway and so neglected their duty in respect thereof, and omitted and failed to provide a proper and safe access to the said station from the said highway for such passengers as aforesaid, and so negligently and unskilfully drove and managed a locomotive engine and divers carriages attached thereto upon and along the said railway at the said place where the same so crossed the said railway, and so drove the said engines and carriages there without giving any notice or signal of the approach thereof, that therefore, and in the lifetime of the said John Stapley, and whilst he was lawfully on his way from the said highway at the last mentioned place through the said gates and across the said railway to the said station for the purpose of becoming a passenger to be carried by the defendants on the said railway, and whilst he was lawfully on the said railway, the last mentioned engine and carriages were driven and struck against the said John Stapley, and he was thereby wounded and injured, and by reason of the wounds and injuries thereby occasioned to him as aforesaid, the said John Stapley, afterwards, and within twelve calendar months next before this suit, died, &c.

Pleas:—First: not guilty. Second: a denial that John Stapley was lawfully on the said railway as alleged.—Issues thereon.

At the trial, before *Pollock*, C. B., at the London Sittings after Trinity Term, 1865, the following facts appeared:—Portslade is a station between Brighton and Worthing on the defendants' line of railway, three or four miles from Brighton. Between Brighton and Portslade the line has

a slight incline from Brighton. On the day of the accident, John Stapley, the deceased, having come from Worthing to Portslade with a return ticket, as he was frequently in the habit of doing, was on his way to the Portslade station to meet a train back to Worthing. Stapley was on foot, and the road along which he walked (which is a public carriage and footway) crosses the defendants' line at the Portslade station upon the level, passing within about a yard of the passengers' platform. The station for passengers, as well as the platform, is on the south side of the line; consequently, Stapley, coming from the north side, had to cross over. On each side of the line where the road crosses it as above mentioned there are swing gates, and also a swivel gate or turnstile for foot passengers. The swing gates open in the middle both ways. Ordinarily they stand shut across the road, leaving the line clear; but when for the passage of traffic along the road they require opening, the practice is to open them across the line, which is thereby closed (*a*). The swivel gates (which only admit

(*a*) The 8 & 9 Vict. c. 20, s. 47, enacts, "If the railway cross any turnpike road or public carriage road on a level, the Company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway; and the person entrusted with the care of such gates shall cause the same to be closed as soon as such horses, &c., shall have passed through the same under a penalty of 40*s*. for every default therein."

Among the rules and regulations which the defendants issue for observance by their servants are the following with respect to level crossings.

219. Unless a written order is given to the contrary, the gates must be kept shut across the carriage road, except when required to be opened to permit of the railway being crossed.

220. Whenever it is required

1865.

STAPLEY v. LONDON, BRIGHTON AND SOUTH COAST RAILWAY CO.

the passage of foot passengers) are never fastened. Express trains from Brighton do not stop at Portslade. An express is due to pass Portslade a few minutes before the stopping train which Stapley was on his way to meet, and this express was four minutes overdue when Stapley reached the railway, the stopping train being not yet due. No servant of the Company was at the gates or on the platform, so that Stapley was not seen when he commenced crossing the line. When first seen he was crossing in a transverse direction (as was the constant practice among railway passengers) from the gates on the north side to the platform on the south side; but whether he had got upon the line by passing through the swivel gate or the swing gates did not appear. One of the swing gates on the north side was partially open into the road. Half an hour before it had been seen closed. The gates on the south side were closed, though not fastened. A porter, who came on the platform while Stapley was in the act of crossing, saw the express train coming up from Brighton and described Stapley as walking slowly across the railway with his head down. The porter shouted, but Stapley, who was partially deaf, walked on without apparently hearing, and was struck by the buffer of the engine, and killed when close to the platform. The driver of the express, when he saw Stapley, whistled, but

to cross the railway the gateman must, before opening the gates, satisfy himself that no train or engine is due, or in sight; he must then shew his stop signals, which must be exhibited until the way is clear.

The 2 & 3 Vict. c. 45, s. 1, also enacts:—"That, wherever a railroad crosses or shall hereafter cross any turnpike road, or any highway or statute labour road for carts or carriages, the proprietors or directors of the Company of proprietors of the said railroad shall make and maintain good and sufficient gates across each end of such turnpike or other road at each of the said crossings, and shall employ good and proper persons to open and shut such gates, so that the persons, carts or carriages passing along such turnpike or highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railroad, &c.

at that time the accident was inevitable. The excuse given for not whistling on approaching the station was that, when signals can be clearly seen from a distance, as at Portslade, it is not the practice to whistle. The signals were stated to be right for passing the station. From the Portslade station a train coming from Brighton is visible at 600 yards' distance, at which point there is a bridge intercepting the view beyond. Shortly before the accident one of the defendants' servants had been killed at Portslade, and it was suggested by the plaintiff's counsel that the reason there was no gatekeeper was that at the time of the accident the staff at the station was incomplete. An additional servant had been employed since the accident. It was further shewn that the station master was away on leave, but a "relieving station clerk" (whose regular duty is to supply the place of any station master away on leave) was acting in his place.

The learned Judge left to the jury the question whether the accident resulted from any want of due precaution on the defendants' part, or from the carelessness of the deceased, and the jury found for the plaintiffs.

Bovill, on a former day in this Term, obtained a rule nisi for a new trial, on the grounds that the verdict was against the weight of evidence; and that the deceased had, by his own want of care, contributed to the accident; also on the ground of misdirection in this, that the learned Judge ought to have directed a verdict for the defendants; against which

Manisty, *Garth* and *M. Griffiths* shewed cause.—Conceding, for the purpose of argument, that the statutory provisions as to level crossings do not relate to the protection of persons on foot, still the facts of this case disclose evidence of negligence on the part of the railway Company. It is true that in the earlier cases it has been said that, in autho-

1865.

STAPLEY v. LONDON, BRIGHTON AND SOUTH COAST RAILWAY CO.

rizing the use of locomotive engines, the legislature has sanctioned the use of a dangerous instrument: *Rex* v. *Pease* (*a*); but that proposition has since been qualified. Later cases establish that, in the use of that instrument the railway Company is bound to adopt all practicable means to protect the public, and in this respect is not relieved from its common law liability. *Vaughan* v. *The Taff Vale Railway Company* (*b*) asserts that principle. Although the decision of the Court below was there reversed, that was because the case on appeal shewed the defendants had taken all practicable precautions which science could suggest to avert mischief. Under circumstances like the present the sufficiency of the precautions is for the jury to determine: *Bilbee* v. *The London, Brighton and South Coast Railway Company* (*c*). In *Marfell* v. *The South Wales Railway Company* (*d*) the defendants, though not under any statutory obligation, were held responsible for negligence in leaving open certain gates connecting their line with a tramway, which also belonged to them, at the suit of persons using the tramway for hire by the defendants' license. The invitation to use the defendants' tramway in that case cannot be distinguished from the invitation here to use the station. If affirmative evidence of negligence be necessary it is here shewn. But it is not necessary in many cases: *Byrne* v. *Boadle* (*e*), *Scott* v. *The London Dock Company* (*f*). The negligence in this case consisted in the absence of all precautions rather than in any one specific omission. The damage flowing directly from the omission of a duty imposed by statute, the defendants are responsible for it, whatever the purpose might be for which the duty was imposed.—[They also contended that the verdict was not against evidence.]

(*a*) 4 B. & Ad. 30.
(*b*) 5 H. & N. 679.
(*c*) 18 C. B. N. S. 584.
(*d*) 8 C. B. N. S. 525.
(*e*) 2 H. & C. 722.
(*f*) 3 H. & C. 596.

Bovill, Garth and *Hannen*, in support of the rule.—The duty which, by statute, is imposed on the defendants as to gates and gatemen at level crossings has no relation to foot passengers. Foot passengers, therefore, can maintain no action founded on the neglect of that duty. It is said, however, with truth, that a duty is imposed on the defendants at common law to use due care, but of the neglect of that duty there was in this case no evidence. The main argument has been that an invitation was held out to the deceased by which he was induced to cross the line. But the circumstance that one of the gates was partially open, not across the line, but into the road so that the line was clear, could constitute no such invitation. In *Wilkinson* v. *Farrie* (*a*) stronger facts were held no evidence of invitation. Here it was the duty of the deceased being in a dangerous place to be on the look out for danger. As regards the management of the express train, to fix the defendants with negligence in that respect affirmative proof of negligence should have been adduced: *Cotton* v. *Wood* (*b*) —[They also contended that the verdict was against evidence, and that the deceased by his own want of care had contributed to the accident.]

Cur. adv. vult.

CHANNELL, B., now said.—The judgment which I am about to deliver is that of my brother *Pigott* and myself.

This action was tried before the Lord Chief Baron, when the jury found a verdict for the plaintiffs. Early in the present Term an application was made for a new trial on the ground, first, that the verdict was against the weight of evidence; secondly, that the deceased, by his own negligence, had contributed to the accident; and, thirdly, that there was no evidence for the jury of negligence on the part of the

(*a*) 1 H. & C. 633. (*b*) 8 C. B. N. S. 568.

1865.
STAPLEY v. LONDON, BRIGHTON AND SOUTH COAST RAILWAY CO.

defendants. The rule was argued before the Lord Chief Baron, my brother *Pigott* and myself. When the argument was concluded we took time to consider our judgment, there being another case (*a*) pending somewhat similar in its circumstances.

My brother *Pigott* and myself are of opinion that the rule should be discharged. With respect to the two first grounds we do not consider that the verdict was against the weight of evidence, or that the deceased was guilty of such contributory negligence as to disentitle the plaintiffs to recover.

But it was argued that there was no evidence for the jury of negligence on the part of the defendants, and that the Lord Chief Baron ought to have withdrawn the case from their consideration. The deceased was knocked down and killed by an express train at the Portslade station of the defendants' railway; and the station was at a point which intersected a public carriage way and a public footway. On each side of the carriage way there were swing gates, which were not kept fastened. Besides the gates for carriage traffic there was a swivel-gate, or turnstile, for foot passengers to pass through when the carriage gates were shut. The express train was four minutes after its time, and the deceased, when he was knocked down, was crossing the railway somewhat in a transverse direction towards the platform of the station. It was contended that the deceased, especially as he was deaf, should have taken care to ascertain whether a train was approaching, and should have crossed the railway in a straight line, and that if he had done so, the accident would not have occurred. But, as I before stated, we think that the verdict ought not to be disturbed on the ground of contributory negligence on the part of the deceased.

(*a*) *Stubley* v. *The London and North Western Railway Company*, *ante*, p. 83.

At the time of the accident one of the carriage gates was open, which about half an hour before the accident took place was shut. It did not appear who opened it, nor whether the deceased came upon the railway through the carriage gate or the turnstile. The 219th and 220th rules of the Company provide that the gates across the carriage road shall be kept shut, except when required to be opened, to permit the railway to be crossed, and that the gateman, before opening them, shall satisfy himself that no train or engine is due or in sight. But it was argued that, whatever obligation the rules imposed on the Company was for the protection of persons crossing the railway with carriages or cattle, and had no application to foot passengers. In this case the gate was open, no gateman was present, and the train was overdue. There is no doubt that a carriage passenger would have had a right to complain of that as negligence, and we think that it held out an implied invitation to foot passengers to cross the line; and that it amounts to negligence for which the Company are liable.

We think the principle of this case is the same as in the case of *Bilbee* v. *The London, Brighton and South Coast Railway Company* (*a*). We adopt the opinion there expressed by *Erle*, C. J., that it is the duty of the Courts not to impose upon railway Companies burthens larger than the legislature has intended that they should bear; and we do not mean to lay it down as a rule that they are bound to place guards at every footway; but at the same time, although they may in certain cases be authorized to cross a carriage way or footway on the level, the legislature has not exempted them from the common law obligation of using due and ordinary care in the conduct and management of their railway, so as to prevent accidents to persons crossing it. We

(*a*) 18 C. B. N. S. 584.

1865.

STAPLEY v. LONDON, BRIGHTON AND SOUTH COAST RAILWAY CO.

are of opinion that the evidence was properly submitted to the jury, and that there is no ground for a new trial.

POLLOCK, C. B.—I entirely concur with the judgment delivered by my brother *Channell.* I thought at the trial that I could not withdraw from the jury the negligence of the Company with reference to opening and shutting the gates of the carriage way. It seemed to be admitted that if this had been the case of a carriage passenger, the Company would have been liable; but it was contended that because the deceased was a foot passenger he had no right to avail himself of the gate for carriage passengers. But there ought to have been a man at the gate, and there was not. The reason given at the trial was that a man had not been appointed specially for that purpose, and in the absence of the station master the same person performed the office of station master and gateman. The deceased coming to the spot, looking around him, and seeing no man attending the gate, would naturally conclude that no train was expected. It is said that the deceased ought, nevertheless, to have taken care to ascertain that no train was approaching, but when circumstances existed which amounted to a declaration by the Company that no train was expected, it cannot be said that there was not negligence on the part of the Company which may have deceived the deceased, and induced him to cross the line. The rule will, therefore be discharged, and I own that I am not dissatisfied with the result at which the Court has arrived.

Rule discharged.

MICHAELMAS VACATION, 29 VICT.

IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

1865.

Nov. 30.

ROBERTS and Another *v.* ROSE.

A person, in abating a nuisance to his property, may justify an interference with the property of the wrongdoer, but only so far as is necessary to abate the nuisance.

It is the duty of a person, who enters upon the land of another to abate a nuisance to do it in the way least injurious to the owner of the land entered.

THIS was an appeal by the plaintiffs against the decision of the Court of Exchequer in making absolute a rule obtained by the defendant to enter a nonsuit; and in discharging a rule obtained by the plaintiffs to enter a verdict for them on the third issue. The pleadings and facts fully appear in the report of the case in the Court below: 3 H. & C. 162.

Mellish (*Matthews* with him) argued for the plaintiffs (*a*). —First, the allegation in the replication to the second plea to the new assignment, that the water might have been *lawfully* obstructed lower down the watercourse in the land

Where there is an alternative way of abating a nuisance, which involves an interference with the property of an innocent person, or a wrongdoer, the interference must be with the property of the wrongdoer.

The plaintiffs, by parol licence from L. and the defendant, constructed a watercourse, through which the water flowed from their colliery across the land of L. and of the defendant into a canal. The defendant revoked his license and entered upon the land of L. and obstructed the watercourse, whereby the plaintiffs' mines were flooded. If the obstruction had been made lower down on the defendant's land, there would have been less damage altogether, and none to the plaintiffs but some damage to L. The damage to L. might have been obviated at trifling expense by mechanical arrangements, but L.'s assent to such arrangements was never asked.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer) that the watercourse was obstructed in a reasonable way, since the other mode would have caused damage to an innocent third party.

(*a*) Before *Blackburn*, J., *Mellor*, J., *Montague Smith* J., and *Lush*, J.

1865.
ROBERTS
v.
ROSE.

occupied by Lowe, was proved. If a person can abate a nuisance by some act on his own land, he is not justified in entering on his neighbour's land. [*Blackburn*, J.—The inevitable consequence of the defendant stopping the water lower down would have been to flood Lowe's land.] Lowe could not have maintained an action for the stoppage, for he had no right to a watercourse over the defendant's land. In an action upon the case for a nuisance the plaintiff must shew himself entitled to the thing to which the nuisance was done at the time of the nuisance: as in an action upon the case for diverting his watercourse to his mill, he must shew that he was seised of the mill at the time: R. Cro. El. 751, Com. Dig. Action upon the Case for a Nuisance (E. 1.). As the defendant might have lawfully obstructed the water upon his own land he was not justified in causing damage to the plaintiff by stopping it higher up on the land of Lowe. [*Blackburn*, J.—Could the defendant justify the doing mischief to Lowe's property without shewing that he was a party to the nuisance?] A person has no right to enter upon the land of another to abate a nuisance unless it is absolutely necessary. [*Lush*, J.—Suppose there were two spots upon the defendant's land at which he might have stopped the water, would he be bound to do it at the one rather than the other?] He would be bound to do it where it would be least injurious to the plaintiffs. As Lowe had no right to have the water flow through the defendants' land, what action could he maintain against the defendant for stopping it? [*Blackburn*, J.—Why not trespass for flooding his land?] The remedy, if any, would be against the plaintiff, who first caused the water to flow: *Scott* v. *Shepherd* (*a*). Perhaps

(*a*) 2 W. Black. 892.

the defendant would not have been justified in stopping the water on his land without giving notice to Lowe. [*Blackburn*, J.—If he had done so, no doubt Lowe would have revoked his license, and stopped the water from coming on his land, so that the same result would have followed.] The authorities are collected in Gale on Easements, p. 520, 3rd ed., and there is no instance of an abatement of a nuisance by the act of the party aggrieved, except upon his own land or upon the land of the person who caused the nuisance.

Secondly, the learned Judge was wrong in directing a verdict for the defendant on the third plea to the second count. It was a material part of the issue on that plea, whether the plaintiffs had the license of the occupier to have the water flow over the land on which the defendant obstructed it. The plaintiff had such a license, and it was never revoked. The defendant's revocation only applied to the land lower down.

Gray (with whom was *Macnamara*) appeared for the defendant, but was not called upon to argue.

BLACKBURN, J.—We are all of opinion that the judgment of the Court below must be affirmed. On one point, however, my brother *Montague Smith* entertains some doubt.

We all agree that a person may justify an interference with the property of another for the purpose of abating a nuisance, if that person is the wrongdoer, but only so far as his interference is necessary to abate the nuisance. We also agree that it is the duty of a person who enters upon the land of another in abating a nuisance, to do it in the way least injurious to the owner of the land. We also agree that where there is an

1865.
ROBERTS
v.
ROSE.

alternative way of abating a nuisance, if one way would cause injury to the property of an innocent third party or to the public, that cannot be justified, although the nuisance may be abated by interference with the property of the wrongdoer. Therefore, where the alternative way involves an interference either with the property of an innocent person or the wrongdoer, the interference must be with the property of the wrongdoer.

Applying those principles to the present case, it appears that a license was originally given to the plaintiffs by the defendant's lessor and Lowe to make and use a watercourse which flowed across Lowe's land, and then across the defendant's into a canal. The effect of this was that there was a revocable license, which was to remain in force so long only as Lowe permitted the water to flow across his land, and the defendant also authorized it to flow across his land. When the defendant revoked the license and said that the water should no longer flow across his land, the plaintiffs, having notice of the revocation, were wrongdoers in continuing to pump the water into the watercourse on Lowe's land; for he had authorized the plaintiffs to use that watercourse so long only as the water would flow through it into the watercourse on the defendant's land. If the defendant had come to Lowe and said, "I will no longer allow the water to flow on to my land; you must revoke your license," Lowe would, no doubt, have said to the plaintiffs, "Stop the water coming on my land, unless you can make some arrangement by which it may be carried away." It is clear that after that the plaintiffs would have had no right to complain if Lowe had stopped the water from coming on his land; and if he had done so, the very mischief would have ensued of which the plaintiffs now complain, the only difference being that it would have been caused by Lowe instead of the defendant.

Now, could the defendant have lawfully put a dam and obstructed the water on his own land at the place I (*a*) when the inevitable consequence would be to flood Lowe's land? That would have been a wrong to Lowe, and his cause of complaint would have been, not that the defendant obstructed the watercourse upon his own land (which he had a right to do), but that, without justification, he caused the water to flood Lowe's land. That would have been a trespass. Therefore, if the defendant had stopped the water in the way in which the plaintiffs say that he ought to have stopped it, he would have done a wrong to Lowe, an innocent third person. That being so, in estimating what was a reasonable way of abating the nuisance, we must look at the mischief actually done to the wrongdoer's property, and at the same time consider the mischief which would have been done to the property of an innocent third person, if the water had been stopped in any other way; and it certainly seems that the fair and reasonable way was to stop it without doing injury to an innocent person.

But then the defendant, in stopping the water at the point A (*a*) necessarily committed a trespass against Lowe by crossing his land; and my brother *Montague Smith* entertained some doubt whether, as in either way of stopping the water some wrong would be done to Lowe, that did not raise a question for the jury, and afford ground for a new trial. The majority of the Court however think as to this point, which was not raised at the trial, that though the relative amount of these two wrongs might raise a question for the jury, the slightness of the one wrong, coupled with the fact that Lowe made no complaint, brings the case within the rule that a nonsuit shall not be disturbed because there may have been a scintilla of evidence for the jury, which if it had been left to them would not have warranted a verdict for the plaintiff.

(*a*) See the plan, 3 H. & C. 162.

1865.

ROBERTS v. ROSE.

MELLOR, J., and LUSH, J., concurred.

MONTAGUE SMITH, J.—I agree with the principles of the decision pronounced by my brother *Blackburn*. My only doubt was, whether it was not a question for the jury, upon the evidence, whether the defendant had stopped the water in a way which was least injurious to Lowe. If the defendant could have entered upon Lowe's land without committing a trespass, or if he could have stopped the water at the point I (*a*) without flooding Lowe's land and subjecting himself to an action at his suit, I should have thought that he would have been liable to the plaintiffs, because, having two courses open to him, he adopted that which did the most injury to them. But it appears by the evidence that the defendant could not have stopped the water at the point I without flooding Lowe's land; and if that fact had stood alone, no doubt the nonsuit would have been right. But it also appears that, by stopping the water at the point A. (*a*), the defendant committed a wrong against Lowe, and subjected himself to an action at his suit. Then comes the question whether greater mischief was done to Lowe by stopping the water at the point A than would have been done to him if it had been stopped at point I. That seemed to me a question for the jury. But upon the facts, I think that the jury were not warranted in coming to the conclusion which they did. I do not dissent from the view taken by the other members of the Court, and only express a doubt whether there was not some evidence for the jury. However, upon the whole I think that substantial justice has been done, and that the judgment of the Court below should be affirmed.

Judgment affirmed.

(*a*) See the plan, 3 H. & C. 162.

1865.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

WHITTAKER and Another *v.* LOWE. *Nov.* 30.

In estimating the requisite majority in value of assenting creditors, under the 192nd section of the Bankruptcy, 1861, the value of securities held by them must be taken into account.

THIS was an appeal from the decision of the Court of Exchequer in discharging a rule to enter a verdict for the plaintiffs, pursuant to leave reserved at the trial (*a*).

The cause was tried, before *Mellor*, J., at the Manchester Spring Assizes, 1865, when it appeared that the action was brought to recover the sum of 346*l.* 19*s.*, the balance due from the defendant to the plaintiffs for work done by them as millwrights.

The only defence relied upon by the defendant was, that after action brought a deed of arrangement, under the 192nd section of the Bankruptcy Act, 1861, had been entered into between the defendant and his creditors.

This deed was not executed or assented to by the plaintiffs; and the sole question was, whether it was executed or assented to in writing by a majority in number representing three-fourths in value of the defendant's creditors.

It was proved that if, in estimating the value of the debts of the creditors who executed or assented to the deed, the value of the securities held by them ought to be deducted, three-fourths in value had not assented; but if the value of such securities ought not by law to be deducted, a majority in number representing three-fourths in value

(*a*) Not reported, the Court of Exchequer having discharged the rule, on the authority of *Turquand* v. *Moss*, 17 C. B. N. S. 15.

1865.

WHITTAKER v. LOWE.

had executed the deed, or assented in writing to its provisions.

The learned Judge ruled, on the authority of *Turquand* v. *Moss* (*a*), that the value of the securities held by creditors should not be deducted in order to arrive at the value of their debts, and directed the jury to find a verdict for the defendant, leave being reserved to the plaintiffs to move to enter the verdict for them for 346*l.* 19*s.*

The question for the opinion of the Court of Appeal is, whether or not, in estimating the value of the debts of creditors, who under the 192nd section of the Bankruptcy Act, 1861, are required to assent to a deed made between a debtor and his creditors, in order to make it binding on non-assenting creditors the value of securities held by creditors ought to be deducted.

If the Court shall be of opinion in the negative, the verdict for the defendant shall stand, but if the Court shall be of opinion in the affirmative, a verdict is to be entered for the plaintiffs for 346*l.* 19*s.*, with judgment accordingly.

Holker argued for the plaintiffs (*b*).—In estimating the three-fourths in value of assenting creditors, under the first condition of the 192nd section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), securities held by creditors ought not to be taken into account. The authorities on this subject are not uniform. In *Ex parte Godden* (*c*) the Lords Justices held that the debts due to secured as well as unsecured creditors must be taken into account. But there it was not necessary to decide the point, because the deed was bad on the ground that it did not extend to all the creditors. [*Blackburn*, J.—Two points were raised, upon either of which the case might have been disposed of,

(*a*) 17 C. B. N. S. 15.

(*b*) Before *Willes*, J., *Blackburn*, J., *Mellor*, J., *Montague Smith*, J., and *Lush*, J.

(*c*) 1 De Gex, J. & S. 260.

but this point was expressly decided.] There no mention was made of secured creditors, and the question was rather whether they should be reckoned at all. [*Blackburn*, J.—The judgment of *Knight Bruce*, L. J., is that creditors holding security, good or bad, as well as creditors wholly without security, must be reckoned.] That is, in ascertaining the *number* of creditors, not the *value* of their debts. The value of the creditor's debts must be ascertained in the manner provided by the 97th section for the purposes of a petition, viz., after deducting the value of the property comprised in the securities. *Turquand* v. *Moss* (*a*) was decided on the authority of *Ex parte Godden*; and *Byles*, J., said that, but for that decision, he should have felt inclined to adopt a different conclusion. [*Montague Smith*, J.—There *Erle*, C. J., does not altogether rely on the decision in *Ex parte Godden*, but gives as one reason for his judgment that the Act of 1861 omits the proviso contained in the 224th section of the Bankrupt Law Consolidation Act, 1849.] In *Ex parte Spyer* (*b*) Lord *Westbury*, C., said that secured creditors rank under a deed of trust for the amount remaining after deduction of the value of their securities. In *Ex parte Smith* (*c*) Lord *Westbury*, C., expressed an opinion that the *value* of a debt was the amount of the debt minus the property held by the creditor. In a Court of appeal this matter must be considered as res integra. The object of the legislature was to give the creditors a control over the property of the debtor in proportion to their interest in it; but if, in ascertaining the value of the debts, securities are to be reckoned, the consequence will be that secured creditors, although they may have no interest whatever in the debtor's property, will bind the unsecured creditors, and compel them to accept a composition,

(*a*) 17 C. B. N. S. 15.
(*b*) 32 L. J. Bank. 62. 64.
(*c*) Not reported, except in the *Law Times*, vol. 10, p. 551.

1865.
WHITTAKER v. LOWE.

however small. The word "value," in the first condition of the 192nd section, does not mean "value in amount." The 97th section shews that the value of a debt is the amount after deducting the value of the securities. [*Blackburn*, J.—That section is carefully worded to confine its operation to a petition in bankruptcy.] By the 197th section the value is to be ascertained according to the law and practice in bankruptcy, unless the deed otherwise provides. In the 109th section, "the majority in value of the creditors" means the majority who have proved their debts, in which case they must have given up or realized their securities. [*Mellor*, J.—The 110th section seems to refer to the majority in value of creditors, whether they have proved or not.] By the 116th section the creditor's assignees are to be chosen by "the majority in value of the creditors who have proved their debts." The "majority in value of the creditors," in the 122nd section, has the same meaning.—He also referred to the 124th, 185th and 188th sections.

R. G. Williams appeared for the defendant, but was not called upon to argue.

WILLES, J.—I am of opinion that the judgment of the Court below ought to be affirmed. The question turns on the true construction of the first condition of the 192nd section of the Bankruptcy Act, 1861, which requires the assent of "a majority in number, representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to 10*l.* and upwards;" and the point to be decided is, whether, in ascertaining the persons who answer the description of creditors representing three-fourths in value, securities held by creditors are to be taken into account.

Three answers have been suggested. First, that the same test must be applied in ascertaining the creditors who constitute a majority in number, as in ascertaining those who represent three-fourths in value; and that, in both cases fully secured creditors must be excluded.

Secondly, it is said that because it is impossible that a person holding security for his debt should be thereby rendered *not* a creditor, therefore as he cannot be excluded from the majority in *number*, this section, dealing with the same class of persons for both purposes, must mean that, in estimating the three-fourths in *value*, he is to be reckoned in respect of the debt due to him. That was the answer given by the Lords Justices in *Ex parte Godden* (*a*), and by the Court of Common Pleas in *Turquand* v. *Moss* (*b*). In the latter case my brother *Byles* observed that but for the decision in *Ex parte Godden* he should have adopted a different conclusion, but he did not suggest any distinction between the mode of ascertaining the majority in *number* and the three-fourths in *value*. He seems to have considered that as it might be unjust and inconvenient to include the secured debts, creditors whose debts were fully secured ought to be altogether excluded, in estimating the three fourths in value.

The third answer is that given by Lord *Westbury*, C., in *Ex parte Smith*, viz., that a person holding security for his debt must still be ranked in the *number* of creditors, although possibly upon a sale of the security a greater amount than his debt may be realized; but inasmuch as it is impossible to tell whether he is a creditor in *value* until his security has been realized, and inasmuch as his debt is practically of no value in the case of his being at no risk, the amount of his security must be deducted in ascertaining the three-fourths in *value* of the creditors. Therefore, the

(*a*) 1 De Gex, J. & S. 260. (*b*) 17 C. B. N. S. 15.

1865.
WHITTAKER v. LOWE.

Lord Chancellor suggested different methods in ascertaining the majority in *number* and the three-fourths in *value* of creditors.

It is obvious that the question turns upon the construction of the word "value." The weight of authority, and indeed of reasoning, is in favour of reckoning as "a creditor" a person whose debt is even fully secured. Such is the literal construction of the language of the first condition of the 192nd section; and inasmuch as a person holding security may nevertherless have some interest in the debtor's property, he must be reckoned in ascertaining the majority in *number* of creditors. But it is argued that the construction of that condition negatives the taking securities into account in reckoning the three-fourths in *value* of creditors. But it is not likely that the legislature would have left it to a sense of justice or convenience to determine whether a person whose debt is secured is to be treated as a creditor in value to the whole amount of his debt, or only to the extent of the probable or possible balance due when his security is realized. It is argued that the legislature has made a distinction between creditors who hold security and those who do not. I can well understand a man of business saying, "My security may never be realized; it may fall or rise in value: I do not choose to sell at present, because my debtor, who has an interest in the surplus after satisfaction of my debt, may complain." In such a case, who is to settle what is the value of the debt? There would be a variety of persons differing in their valuation, and affirming that the security was of more or less value; and it is far better that all the creditors should be included in respect of their entire debts, by which the test of value would be free from difficulty. It may be said that it would be sufficient to take into account the probable value of the securities at the time the

deed was executed; and that secured creditors ought not to have the inequitable right of interfering with the property of the debtor, in which they have not so great an interest as unsecured creditors. But arguments may be advanced on both sides, and we must look to the language of the Act in order to ascertain what passed in the mind of the legislature when the enactment was framed. I decline to decide upon the ground of policy.

The real question is, what is the meaning of "value of creditors" taken with its context in the first condition of the 192nd section. The "value of creditors of such debtor" is a loose expression, and should be read, the "value of the debts owing to the creditors of such debtor." Does that mean the value of the debts in monies numbered, or the value after the securities are realised, or, as might be suggested, the value which the debts would fetch in the market? Primâ facie, I should be disposed to adopt the construction that the "value of a debt" is the amount of the debt itself. That is adopted by the legislature as being the meaning of the word "value," in the 116th section, which enacts that it shall be competent to "the majority in value of the creditors who have proved debts to choose an assignee or assignees of the bankrupt's estate and effects. The term "value of the creditors," in the first condition of the 192nd section has the same meaning. In the 116th section "value" clearly means "amount," because the enactment only deals with creditors who have proved debts. I find a confirmation of that construction in the 97th section, which provides that "in the computation of debts for the purposes of any petition under this Act, there shall be reckoned as debts sums due to creditors holding mortgages or other available securities or liens, after deducting the value of the property comprised in such mortgages,

1865.
WHITTAKER v. LOWE.

securities or lien." That is an express enactment that persons holding mortgages and other securities are "creditors;" and that for the purposes of a petition under the Act, the debts are to be computed after deducting the value of the property comprised in such mortgages. So that, where an uncertainty exists as to the value of the debts, there is an express provision respecting it; and any uncertainty as to the value of the property comprised in the securities would come under the consideration of the Court of Bankruptcy, who would, no doubt, take proper means to ascertain its value. The 97th section proceeds to say that "such interest and costs as shall be due in respect of any of the debts" shall be reckoned as debts. There is, therefore, an intention expressed in that section to provide for the mode of ascertaining the amount of debts for a particular purpose; and the section is an affirmative and express enactment on this subject with respect to a different class of debts and a different class of creditors.

But not only the rule, "expressio unius est exclusio alterius," applies to the construction of the 192nd and 97th sections; but another circumstance is to be considered, because it forms part of the history of this Act,—I mean the circumstance that the 12 & 13 Vict. c. 106, in dealing with a cognate matter, did in express terms introduce the provision which we are now asked to introduce by construction. That provision is to be found at the end of the 224th section of the 12 & 13 Vict. c. 106,—one of the sections repealed by the Act of 1861, and for which the 192nd section of that Act is substituted. The 224th section of the 12 & 13 Vict. c. 106, contains this proviso: "that every creditor shall be accounted a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and

other *such* available securities or liens from such trader shall appear to be the balance due to him." The omission of the word "such," in the 97th section of the Act of 1861, in my opinion makes no difference. It seems as if the person who framed the 224th section of the 12 & 13 Vict. c. 106, felt this very difficulty as to who is to settle the amount due after deducting the value of mortgages or other securities, and met it by introducing the words "upon an account fairly stated, after allowing the value of mortgaged property and other such available securities," &c. That proviso is omitted in the 192nd section of the Act of 1861. I am almost inclined to say that the legislature, by the express language of that enactment has, as it were, ostentatiously shewn an intention that the proviso so repealed, and only made applicable to a different subject-matter, should not apply to a case like this. Looking at the true construction of the Act, and setting aside all considerations of mere policy or convenience, it would seem that the just conclusion is that at which the Court of Exchequer arrived.

BLACKBURN, J.— I am of the same opinion. The question depends entirely upon the construction of the statute. Can we see, by its language, that the legislature intended it should bear the construction contended for on behalf of the plaintiffs? It is plain that a creditor who holds security for his debt is nevertheless a "creditor." He may sue the debtor, recover judgment and issue execution, so long as bankruptcy does not intervene. The only difference between him and an unsecured creditor is, that he has the means of making available the property which he holds as security, or of availing himself of his remedy against sureties, if any; but until the property is realized, he is a creditor to the amount of the debt due to him. Under the old law

1865.
WHITTAKER v. LOWE.

he might be a petitioning creditor, although his security was not given up or realized. So stood the law when the Act of 1849 passed, and that Act left untouched his rights as a petitioning creditor. By the 224th section of that Act, there was for the first time introduced a power of making arrangements by deed for a composition. That section enacted that every deed of arrangement between a trader and his creditors, signed by six-sevenths in number and value of those creditors whose debts amounted to 10*l.* and upwards, should be binding upon all the creditors; and upon that was engrafted the proviso, "that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." Without that proviso the plain meaning of the enactment would have been "six-sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards," that is, "number of creditors and amount of debts." But the legislature has expressly said that in reckoning the amount the fair value of the securities shall be deducted, and the creditor shall only be accounted a creditor for value in respect of the balance. By the Act of 1861, which is in pari materiâ, the legislature repealed the 224th section of the former Act, and re-enacted it without the proviso; and at the same time inserted a similar provision in the 97th section, probably because in the cases there contemplated the value of the securities could be more easily ascertained. But, whatever may be the reason, it seems to me that when we find the legislature deliberately repealing an enactment and re-enacting it without a proviso, we certainly ought to understand that they do not mean what they formerly said,

but what they now say. The weight of authority is also in favour of this construction, but a Court of error is not bound by the authorities of the Courts below. I therefore think that the judgment of the Court below should be affirmed.

MELLOR, J., MONTAGUE SMITH, J., and LUSH, J., concurred.

Judgment affirmed.

MEMORANDA.

In the previous Trinity Vacation Lord *Westbury* resigned the Great Seal, and on the 7th of July, 1865, it was delivered to Lord *Cranworth*.

In this Michaelmas Vacation the following gentlemen were appointed Her Majesty's Counsel:—*Henry Hopley White*, Esq., of the Middle Temple, The Honorable *Evelyn Melbourne Ashley*, of Lincoln's Inn, *Henry William Cripps*, Esq., of the Middle Temple, *John Robert Davison*, Esq., of the Middle Temple, and *William Vernon Harcourt*, Esq., of the Inner Temple.

REGULÆ GENERALES.

REGULÆ GENERALES.

The Commissioners of Her Majesty's Treasury, and the Right Honourable Sir FREDERICK POLLOCK, Knight, Lord Chief Baron of Her Majesty's Court of Exchequer, and Sir GEORGE BRAMWELL, Knight, and Sir WILLIAM FRY CHANNELL, Knight, Barons of the said Court, do hereby in pursuance and execution of the powers in that behalf contained in "The Crown Suits, &c., Act, 1865," "The Common Law Courts (Fees) Act, 1865," and of every or any other power enabling them in this behalf, appoint and direct:—

1. That the fees set forth in Schedule A., hereafter mentioned, shall be charged in proceedings in suits, commenced by English information in this Court, and such fees shall be collected, not in money, but by means of stamps, denoting the amount of such fees.

2. Such stamps shall be stamped or affixed, at the expense of the parties liable to pay the fees, on or to the vellum, parchment, or paper on which the proceedings, in respect whereof such fees are payable, are written or printed, or which may be otherwise used in reference to such proceedings; and where any of such fees are payable in respect of any matter or thing to be done in the office of the Queen's Remembrancer, and it has not been customary to use in reference to such matter or thing any written or printed document or paper whereon the stamps could be stamped or affixed, the party, or his solicitor, requiring such matter or thing to be so done, shall make application for the same by a short note or memorandum in writing, and a stamp, denoting the amount of the fee so payable, shall be stamped on or affixed to such note or memorandum.

3. Every officer in the Queen's Remembrancer's office, who shall receive any document to which a stamp shall be affixed, pursuant to the provisions hereinbefore contained, shall, immediately upon the receipt of such document, cancel or deface the stamp thereon by obliterating the same by means of a stamp and printing ink, shewing the date of cancellation, and no such document shall be filed or delivered out until the stamp thereon shall have been cancelled or defaced in manner aforesaid.

4. Where stamps impressed upon adhesive paper are used, care should be taken so to select the stamps required to make up the

amount to be affixed to any document as that no greater number of stamps may be affixed thereto than is actually necessary.

5. These rules shall come into operation on the 1st day of January, 1866.

The SCHEDULE A. *above referred to.*

	£	s.	d.
For every oath or declaration of a witness examined before the Queen's Remembrancer or other officer . .	0	2	0
Upon every application to inspect affidavits and depositions, including the inspections	0	3	0
For making all office and other copies, per folio of seventy-two words	0	0	4
The fee of 6*d.* shall be charged and taken in respect of any odd sum of 4*d.* or 8*d.*			
For filing every information	1	0	0
Upon entering every appearance if not more than three defendants	0	7	0
If more than three and not more than six defendants .	0	14	0
And the same proportion for every like number of defendants			
For every certificate	0	5	0
For marking every copy of an information or other document to be served or for delivery . . .	0	5	0
For every writ of distringas, subpœna, or attachment .	0	5	0
For sealing every other writ	1	0	0
Upon every application for a search for a record, and for searching	0	2	0
Upon every application to inspect a record, and for inspecting the same	0	5	0
Upon every application to inspect exhibits if occupied not more than one hour	0	5	0
If occupied more than one hour, per diem . .	0	10	0
Upon every application for the officer's attendance in another Court per diem, and for his attendance, besides reasonable expenses of the officer . . .	1	0	0
Upon the like application for attendance in the Court of Exchequer, per diem	0	10	0
For filing supplemental statements, or statement for revivor	0	10	0
For filing answer	0	5	0
For filing every affidavit, including schedules and exhibits, or other documents not named in this Schedule .	0	2	0

1865.
REGULÆ GENERALES.

	£	s.	d.
For amending every record of an information . .	0	10	0
For every decree or decretal order made by the Court on the original hearing of a cause, or on further directions	2	0	0
For every order or motion of course . . .	0	5	0
For every other order 5*s*., but if more than five folios 1*s*. per folio extra.			
On every petition of rehearing	1	0	0
For every warrant or summons	0	3	0
For signing every report if not more than five folios .	0	10	0
If more than five folios, 1*s*. per folio extra.			
Upon the taxation of every bill of costs as taxed, where the amount shall not exceed £20 . . .	0	10	0
For every additional £20 or fractional part thereof, a further fee of	0	10	0
On references to the Queen's Remembrancer, per hour .	0	10	0

SCHEDULE B.

Fees to be received under the 30th section of the Crown Suits, &c., Act, 1865.

	£	s.	d.
The Queen's Remembrancer, or such other officer of the Court as may be authorized to take evidence as mentioned in the Crown Suits, &c., Act, 1865, sect. 21, shall be entitled to receive, when the examination is at the office, for every hour in which he is employed in the examination of witnesses, the sum of . . .	0	10	0
An examiner especially appointed by an order of the Court or a Judge, for every day in which he is bonâ fide employed in the examination of witnesses, the sum of	3	3	0
If at a distance from his place of residence, one guinea per diem for his expenses, exclusive of travelling.			
For travelling expenses the amount actually and reasonably paid £ *s*. *d*., but in no case to exceed 1*s*. per mile one way.			

Given under our hands, at the Treasury Chambers, Whitehall, this 18th day of December, 1865.

E. H. KNATCHBULL-HUGESSEN.
W. P. ADAM.

We, the undersigned, Lord Chief Baron, and two Barons of Her Majesty's Court of Exchequer, do hereby signify our concur-

1865.

REGULÆ GENERALES.

rence in the before mentioned Rules and Table of Fees, and do appoint such fees to be taken in conformity with the provisions of the aforesaid Act.

FRED. POLLOCK, Lord Chief Baron of Her Majesty's Court of Exchequer.

G. BRAMWELL, W. F. CHANNELL, } Barons of Her Majesty's Court of Exchequer.

REGULÆ GENERALES.

In pursuance of an Act passed in the Session of Parliament held in the 15th & 16 years of the reign of Her Majesty, chap. 73, intituled "An Act to make provision for a permanent Establishment of Officers to perform the duties at Nisi Prius in the Superior Courts of common law, and for the payment of such officers and the Judges' clerks by salaries, and to abolish certain offices in those Courts," we, the undersigned, have caused the undermentioned altered and amended Table of Fees to be prepared specifying the fees proper to be demanded and taken by the Associates in the Superior Courts of common law, namely:—

	£	s.	d.
On entering any cause for trial	1	0	0
On receiving the record	1	0	0
On returning the postea	1	0	0
On re-entering and receiving the record of any cause which has been withdrawn or struck out	1	0	0
On receiving a writ of subpœna to attend any Court	1	0	0
For attendance at any Court on a writ of subpœna for every day after the first day	1	0	0

All other fees than those before mentioned are hereby abolished, and are not to be taken by any person in the Associates' Offices under any pretence whatever.

A. E. COCKBURN, Lord Chief Justice of the Court of Queen's Bench.

W. ERLE, Lord Chief Justice of the Court of Common Pleas.

FRED. POLLOCK, Lord Chief Baron of the Court of Exchequer.

G. BRAMWELL, Baron of the Court of Exchequer.

COLIN BLACKBURN, Justice of the Court of Queen's Bench.

MONTAGUE SMITH, Justice of the Court of Common Pleas.

REGULÆ GENERALES.

REGULÆ GENERALES.

WHEREAS by an Act passed in the Session of Parliament held in the 28th year of the reign of Her Majesty, cap. 45, entitled "An Act to provide for the collection by means of Stamps of Fees payable in the superior Courts of law at Westminster, and in the offices belonging thereto," it is provided by the third section thereof, that the Commissioners of Her Majesty's Treasury, with the concurrence of the Lord Chief Justices and of the Lord Chief Baron, may, from time to time, make such rules as seem fit for regulating the use of the stamps under this Act, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of adhesive stamps, and keeping account of such stamps. Now we, being two of the Lords Commissioners of Her Majesty's Treasury, with the concurrence of the Lord Chief Justices and of the Lord Chief Baron, do hereby order and direct that the following rules be observed in respect to stamps used in the superior Courts of common law, and in the several offices connected therewith; the Crown Office, Queen's Bench; the Office of Registration of Certificates, &c., of Acknowledgments of Deeds of Married Women, Court of Common Pleas; the Office of Registrar of Judgments, &c., Common Pleas; the Queen's Bench Remembrancer's Office; Court of Exchequer, and in the Judges' Chambers, to take effect on and after the 1st day of January, 1866:—

1. The stamps to be used for collecting the fees payable in the several offices in the Courts of common law at Westminster, and in the Judges' Chambers, by virtue of the above Act, shall, subject to the provisions of the seventh and eighth of these rules, be stamped or affixed at the expense of the parties liable to pay such fees on or to the vellum, parchment, or paper on which the proceedings, in respect whereof such fees are payable, are written or printed, or which may be otherwise used in reference to such proceedings.

2. Where any of such fees are payable in respect of any matter or thing to be done by any officer or in any office of the said Courts, or at the Judges' Chambers, and it shall not have been customary to use

any written or printed document or paper in reference to such matter or thing whereon the stamp could be stamped or affixed, the party, or his attorney requiring such matter or thing to be done, or permitted to be done, shall make application for the same by a præcipe or short note in writing or print, and a stamp denoting the amount of the fee so payable shall be stamped or affixed to such præcipe or note.

3. All adhesive stamps affixed to any paper or document presented to or kept in the possession of any of the officers of the said Courts, or of the clerks to the Judges, shall, before the Act is done or permitted to be done, in respect of which the fee denoted by such stamp is payable, be effectually cancelled by some officer of the said Courts, or by one of the said clerks to the Judges, by obliterating the same by means of a hand-stamp and printing ink, shewing the date of the cancellation, and no such document shall be filed or delivered out until the stamp thereon shall have been cancelled or defaced in manner aforesaid.

4. That when any summons, order or other document has been issued by mistake, and the stamp thereon has been cancelled without having been legitimately used, the Master, Associate or other proper officer of the department to which the fee is payable, or the Judge's clerk, shall certify that such stamps are fit subjects for allowance, and it shall be competent to the Board of Inland Revenue, upon the presentation of such certificate, to allow the amount thereof.

5. That distributors of stamps, and all persons licensed to sell stamps in England and Wales, shall be permitted to sell the stamps above referred to, and that an office be provided in or attached to the Judges' Chambers for the sale of stamps.

6. The several officers of the said Courts, and the clerks to the several Judges shall, on or before the 30th day of April in each year, make out an account of all stamps cancelled in their respective offices, specifying the number of each denomination, and shall render such account to the Lords Commissioners of Her Majesty's Treasury, and the first of such accounts shall be for the three months ended 31st March, 1866, and the second of such accounts for the year ended 31st March, 1867, and so forth.

7. And we do hereby order and direct that the stamps to be used for collecting the fees payable in the offices of the several Masters of the Courts of common law, shall be stamped or affixed at the expense of the parties liable to pay such fees on the several documents mentioned in the second column of the subjoined table.

1865.
REGULÆ GENERALES.

Fees taken in the offices of the Masters of the Courts of Queen's Bench, Common Pleas and Exchequer, in respect of	*Stamp to be affixed upon*
Every writ	Præcipe
Every Appearance . . .	Appearance piece, which shall be of linen paper of the same size and shape as the parchment appearance pieces heretofore used
Filing every document . .	Document filed
Amending any proceeding . .	Order to amend
Every rule	Rule
Every judgment . . .	Entry in Masters' book
Taxing bill of costs . . .	Bill taxed
References to, or Examinations by Masters	Certificate, examination or Report
Payment of money into Court .	Entry in Masters' books
Every certificate . . .	Certificate
Office copies of documents . .	Office Copy
Searches	Præcipe or note filed
Every affidavit or affirmation . .	Affidavit, &c.
Allowance and justification of bail taking special bail as Commissioners	Bail Piece
Filing affidavit and enrolling articles of clerkship	Entry in Masters' book
Every re-admission of an attorney .	Rule for re-admission.

8. And we do further order and direct, that a book or books be kept in the offices of the Associates of the Courts of Queen's Bench, Common Pleas and Exchequer, in which book or books shall be entered the names of the several causes, against which shall be placed adhesive stamps of the value required during the different stages, and it shall be the duty of the Associate, or of such one of his clerks as he shall direct to do it, to cancel such stamps in the manner hereinbefore provided, immediately after they are placed in such books. Given under our hands, at the Treasury Chambers, Whitehall, this 15th day of December, 1865.

RUSSELL.
E. H. KNATCHBULL-HUGESSEN.

We do hereby signify our concurrence in the before mentioned Rules and Regulations.

A. E. COCKBURN, Lord Chief Justice of the Court of Queen's Bench.
W. ERLE, Lord Chief Justice of the Court of Common Pleas.
FRED. POLLOCK, Lord Chief Baron of the Court of Exchequer.

16th December, 1865.

Exchequer Reports.

HILARY TERM, 29 VICT.

1866.

SPENCER and EDWIN HEWETT *v.* CECILE DEMETT. *Jan.* 17.

Proof of a debt under an adjudication in bankruptcy cannot be pleaded in bar as an equitable defence to an action for the same debt.

DECLARATION for goods sold and delivered.

Plea.—The defendant, for defence on equitable grounds, says that, after the accruing of the plaintiff's claim, and after the passing of the Bankruptcy Act, 1861, and before this suit, the defendant committed an act of bankruptcy, and became bankrupt within the meaning of the statutes in force concerning bankrupts, and thereupon a petition for adjudication of bankruptcy against herself, the defendant, was duly filed by the defendant in the Court of bankruptcy, according to the said statute, and such proceedings were had in the matter of the said petition, that the defendant was by the said Court duly adjudged bankrupt, and thereupon, and after the commencement of this suit, but before the plaintiffs declared therein, at a certain sitting duly appointed by the said Court of Bankruptcy in that behalf, the plaintiff Edwin was duly appointed by the said Court to be, and became, the assignee of the estate and effects of the defendant under her said bankruptcy, and the plaintiffs then and there duly proved the debt and claim for which this action is brought under the said petition, and elected to take the benefit of such petition, with respect to such debt and claim, whereby the defendant was

1866.
SPENCER v. DEMETT.

and is in equity discharged from the said debt and claim of the plaintiffs, and their said proof of their said debt is still in force and effect.

Demurrer, and joinder therein.

Holl, in support of the demurrer.—The plea is framed upon the 182nd section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), which provides that the proving a debt under a petition for adjudication in bankruptcy by any creditor shall be deemed an election by such creditor to take the benefit of such petition with respect to the debt so proved. But that enactment is similar in terms to the 14th section of the 49 Geo. 3, c. 121, upon which it was decided, in the case of *Harley* v. *Greenwood* (*a*), that proof of a debt under a commission in bankruptcy cannot be pleaded in bar to an action at law brought for the same debt. There *Bayley*, J., in his judgment points out the inconvenience and injustice which would result if the creditor should be barred of his remedy at law in consequence of having proved his debt. The reasoning applies equally to an equitable as a legal plea. Until the final examination it cannot be known whether the bankruptcy may not be superseded. The defendant might have objected to the proof on the ground that this action was pending; or she might have applied to the Court of Bankruptcy to expunge the debt, or to this Court to stay the proceedings. The case of *Elder* v. *Beaumont* (*b*) is distinguishable. That was an action on a covenant by a debtor to pay the premiums on a policy of insurance on his life, which was assigned to the plaintiff as a security. There was a plea on equitable grounds, that the plaintiff proved part of the principal debt under the defendant's

(*a*) 5 B & Ald. 95. (*b*) 8 E. & B. 353.

bankruptcy, and elected to take the benefit of the petition in respect of the debt; and the question was, whether the whole debt was satisfied so as to render it unjust and against conscience to sue upon the covenant to pay the premiums on the policy intended to secure that debt. At the trial, it appeared that the plaintiff proved for the balance of the debt, but expressly reserved the sum secured by the policy. The Court considered that the averment in the plea must be understood as an election in fact to take the benefit of the petition for the whole debt; and therefore the plea was good on demurrer, but, not being proved, the plaintiff had a verdict. In *Ex parte Diack* (*a*) the Court of Review in Bankruptcy intimated that if the proof were on the same bill as that on which the action was commenced they would issue a perpetual injunction to restrain the action; but as the evidence did not render the fact clear, the matter was referred to the Commissioner.

J. Brown, in support of the plea.—The matter stands on a different footing from what it did before pleas on equitable grounds were allowed. No doubt, at that time when a creditor, by proving his debt, elected to take the benefit of a petition in bankruptcy, the proper course was to apply for a stay of proceedings. But the 83rd section of the Common Law Procedure Act, 1854, has enabled a defendant to plead an equitable defence in any case in which, if judgment were obtained, he would be entitled to relief on equitable grounds. Therefore, the question is, whether, as the plaintiffs have elected to prove their debt, a Court of equity would grant the defendant relief by perpetual injunction. *Ex parte Diack* (*a*) is an authority to that effect. It is said that there cannot be a perpetual injunction, because the bankruptcy may be superseded; but in that

(*a*) 2 Mont. & A. 675.

1866.
SPENCER v. DEMETT.

case application may be made to dissolve the injunction. [*Martin*, B.—*Harley* v. *Greenwood* (*a*) is directly in point.] In the case of *Elder* v. *Beaumont* (*b*) the Court considered that there would have been a good equitable answer if the plaintiff had proved for the whole debt. [*Pollock*, C. B. —A Court of equity would only grant relief quousque. An equitable plea must shew that not only the plaintiff is not entitled to maintain his action, but that he never will be.]

Per CURIAM (*c*).—The plea is bad, and the plaintiffs are entitled to judgment. The defendant, however, may apply at Chambers, on affidavits to set aside the judgment and stay the proceedings, on payment of the costs of the demurrer.

Judgment for the plaintiff.

(*a*) 5 B. & Ald. 95.
(*b*) 8 E. & B. 353.
(*c*) *Pollock*, C. B., *Martin*, B., *Channell*, B., and *Pigott*, B.

Jan. 31.

BAXENDALE and Others *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

The defendants, a railway Company, bound by their act of parliament to take the same rates and tolls from all persons alike under the same or similar circumstances, charged a tonnage rate upon goods over 1 cwt., and a higher rate for articles under that weight. When several parcels, each under 1 cwt., were delivered to the defendants by one person in a single consignment, at one and the same time, and addressed to the same consignee, the defendants charged a tonnage rate upon their aggregate weight. The plaintiffs, common carriers, sent by the defendants' railway large consignments of goods directed to themselves as consignees, each consignment, consisting of several packages, many of them having the names and addresses of the persons to whom the plaintiffs intended to deliver them. The defendants charged the plaintiffs for each package contained in each consignment according to the weight of the package.—*Held*, an inequality of charge, and that the plaintiffs were entitled to recover back the excess.

The plaintiffs carried goods from London to the Isle of Wight, using the defendants' railway for the carriage to Southampton. The defendants, whose railway did not extend beyond Southampton, also carried goods from London to the Isle of Wight. The defendants charged the plaintiffs for the carriage of goods from London to Southampton a higher rate in proportion than, under a contract to carry from London to the Isle of Wight, they charged their customers for the carriage between London and Southampton; but for the carriage between the two latter places they charged the plaintiffs and the rest of the public alike.—*Held*, no inequality of charge.

DECLARATION for work done, money paid and money received for the plaintiffs' use.

Plea.—Except as to 9*l.*, parcel, &c., never indebted, and as to 9*l.*, payment into Court; and that the said sum is sufficient to satisfy the claim of the plaintiffs.—Issues thereon.

The cause came on for trial, before *Martin*, B., at the London Sittings after Trinity Term, 1864, when a verdict was entered for the plaintiffs, subject to a special case (so far as material) as follows:—

The plaintiffs are, and for many years have been, carrying on business under the style of Pickford & Co., common carriers, carrying goods to and from different parts of England. They are in the habit of employing various railway Companies as common carriers for the carriage of goods, including the defendants.

The defendants are the proprietors of the South Western Railway, and are incorporated by the 4 & 5 Wm. 4, c. 88. Their railway runs (amongst other places) from their station at Nine Elms, London, to Guildford and to Southampton. By sect. 149 of the Act, the Company are authorized to take tonnage rates for certain specified goods at 3*d.* per ton per mile, for certain other specified goods at 6*d.* per ton per mile.

By sect. 155, "It shall be lawful for the said Company from time to time to make such orders for ascertaining and fixing the price or sum to be charged or taken by the said Company in respect of small parcels (not exceeding 500 lbs. weight), specie, &c., to be carried upon the said railway, and from time to time to repeal or vary the same as to them shall seem proper: Provided always that the provisions hereinbefore contained as to parcels shall not extend to goods, articles, matters and things sent in large aggregate quantities, although made up of separate and distinct parcels, but only to single and undivided parcels."

By sect. 156, "It shall be lawful for the said Company,

1866.
BAXENDALE v. SOUTH WESTERN RAILWAY CO.

and they are hereby authorized to carry and convey upon the said railway all such goods, articles, matters and things, &c., as shall be offered to them for that purpose, and all such persons as shall apply to be carried along the said railway, or any part thereof, and to demand, receive and recover to and for the use and benefit of the said Company, for such carriage and conveyance as aforesaid of all goods, articles, matters and things, &c., in addition to the usual rates and tolls hereinbefore authorized to be charged and received, such sums of money as the said Company or the said directors may from time to time fix and require."

By sect. 158, "It shall be lawful for the said Company, from time to time, and so often as they shall think fit, to reduce all or any of the rates, tolls or sums by this Act authorized to be taken; and afterwards from time to time again to raise the same, or any of them, so that the same respectively shall not at any time exceed the amount by this Act authorized: Provided always that the said Company shall not partially raise or lower the rates, tolls or sums payable under this Act; but all such rates, tolls and sums shall be so fixed as that the same shall be taken from all persons alike under the same or similar circumstances."

The defendants carry on the ordinary business of a railway Company upon the said line of railway, and also carry on the business of common carriers between the several stations mentioned above and the other stations upon their line, and also between their several stations and places beyond the limits of their line.

The grounds of complaint alleged by the plaintiffs against the defendants, and in respect of which this action is brought, are three in number only, namely:—

1st. In respect of overcharges upon consignments of goods, by charging for their carriage rates according to the weight of packages contained in these consignments

taken separately, instead of a tonnage rate upon the whole of the consignments by the plaintiffs of the same class of goods.

2nd. Overcharges in not allowing to the plaintiffs a sufficient deduction or rebate for the collection, delivery and cartage of goods, both in London and in the country, when those services were not performed by the defendants.

3rd. Overcharges by chgaring upon goods carried for the plaintiffs by the defendants from Nine Elms to Southampton station, thence to be forwarded by the plaintiffs to the Isle of Wight rates which are higher than those charged to other persons under the same or similar circumstances.

The facts upon which the plaintiffs' first claim arises are as follows:—The defendants are in the habit of charging for goods carried by them upon their line according to two different rates, viz., a tonnage rate upon goods weighing over 1 cwt., and a small parcels rates for articles under that weight. The small parcels rate is considerably higher than the tonnage rate.

When goods are delivered to the defendants for carriage by one person in a single consignment, at one and the same time, and are addressed to the same consignee, the defendants are in the habit of adding the weight of all such small packages under 1 cwt. together, and charging for them upon their aggregate weight or tonnage rate, although such goods consist of a number of small packages, each singly weighing under 1 cwt.

The plaintiffs have been and are in the habit of sending by the defendants from one station on their railway to another large consignments of goods, each consignment frequently consisting of a number of small parcels. In every such case the plaintiffs themselves delivered the goods to the defendants at the station whence they were to go,

1866.
BAXENDALE v. SOUTH WESTERN RAILWAY CO.

directed and consigned to the plaintiffs at the station to which they were to be carried, and where they were to be delivered to the plaintiffs, and at such last mentioned station the plaintiffs themselves received them from the defendants. In such cases the plaintiffs delivered to the defendants with each consignment a declaration or ticking-off note, which contained the name of the plaintiffs' firm as the consignors, and also as the consignees of the goods, also the description (but not the weight) of the goods, and the station to which they were to be carried. Each package comprised in any consignment was labelled with a label, on which was printed, in plain letters, "Pickford & Co., Guildford Station." Many of such packages had, in addition to such label, the names and addresses of the persons to whom the plaintiffs intended to deliver them, and had been desired by their customers so to deliver them, such addresses being conspicuously shewn on such packages. Where goods were delivered by the plaintiffs to the defendants, to be carried and delivered by the defendants for the plaintiffs to persons other than the plaintiffs themselves, the names of such other persons were inserted as consignees in the consignment note or declaration, and the goods were addressed to them only, and no such label as before mentioned of "Pickford & Co." was affixed on the goods.

Down to the 29th February, 1864, whenever consignments of goods were delivered to the defendants by the plaintiffs, and labelled to, directed and consigned to the plaintiffs themselves in manner before described, the defendants charged the plaintiffs the tonnage rate upon the aggregate weight of such consignment, whatever the weight of the several packages of which it was composed might be, and that whether the names of the persons to whom the plaintiffs intended to deliver the packages after they had

received them at the defendants' station appeared upon the packages or not; and if they did appear, whether the same name appeared upon all the packages in any one consignment or a different name appeared upon each package.

In February, 1864, the plaintiffs received from the defendants a notice that on the 29th of that month the rates theretofore charged for the plaintiffs' goods traffic would be cancelled and revised rates commence.

From and after the 1st March, 1864, the defendants altered the system and the rate of charge, and the only terms on which they would carry for the plaintiffs were then adopted by them as hereinafter mentioned, that is to say, they charged the plaintiffs separately for each package contained in each consignment sent by the plaintiffs by the defendants' railway, and labelled, directed and consigned by the plaintiffs to themselves in the manner before mentioned, at the tonnage rate or small parcels rate, according to the weight of each package singly, wherever the names of the persons to whom the plaintiffs intended to deliver them after being received at the defendants' station appeared upon the packages in addition to the plaintiffs' label, except in those cases in which the same name appeared upon two or more packages in the same consignment, in which case the defendants lumped together the weight of the last mentioned packages and charged the tonnage rate upon their aggregate weight.—No difference was made by the defendants in thus charging the plaintiffs and in charging any others of the public who sent goods under similar circumstances.

Between the 1st and 26th March, 1864, the plaintiffs sent by the defendants' railway, labelled, directed and consigned to themselves at various stations, in the manner already described, numerous consignments of goods, each

1866.

BAXENDALE v. SOUTH WESTERN RAILWAY CO.

consignment being in the aggregate of more than 1 cwt., though composed of a number of packages varying in size, some being under and some over 1 cwt., and upon these the defendants charged in the manner stated above. The plaintiffs paid the charges under protest, and now seek to recover back 50*l.* 8*s.* 1*d.*, the difference between the rate upon each package, which they were actually charged, and the tonnage rate upon each consignment, which they allege ought to have been charged.

(The second claim was abandoned on the argument by the defendants' counsel, and therefore the facts upon which it arises are omitted.)

The third claim of the plaintiffs arises under the following circumstances.—The plaintiffs, in the course of their business as carriers, are in the habit of carrying goods for their customers from London to Cowes and Newport, in the Isle of Wight, and in so doing they make use of the defendants' railway for the carriage of goods from the Nine Elms station to their Southampton station, but all carriage and cartage of the goods off the line has been done by the plaintiffs themselves, and such goods have been consigned by the plaintiffs to themselves at Southampton only, and not to Cowes or Newport. For the carriage of these goods between Nine Elms and Southampton station, the defendants have charged the plaintiffs uniform rates of 11*s.* 8*d.*, 16*s.* 3*d.* and 19*s.* 7*d.* per ton, according to the classes of the goods, being the same rates as the defendants have charged the rest of the public for similar goods between Nine Elms and Southampton.

The defendants, by arrangements with owners of steamboats and sailing ships or vessels, in their capacity of carriers, have also themselves been in the habit of carrying goods by their railway from London to Cowes and Newport. For the carriage of goods from London to Cowes

and Newport they have charged their customers uniform rates of 20*s.* and 26*s.* 8*d.* per ton, according to the classes of the goods; which charges included collection in London and cartage to Nine Elms, conveyance on the railway from Nine Elms to Southampton station, carriage by tramway from that station to the wharf, and wharf dues there, and carriage by boats from Southampton to Cowes and Newport, but has not included delivery beyond the quays at Cowes and Newport.

The actual cost both to the plaintiffs and defendants of collection and cartage of such goods to Nine Elms station, and the fair market price of such collection and cartage is not less than 5*s.* per ton. The actual cost to the plaintiffs, and the fair market price of the conveyance of such goods from Southampton station to Cowes and Newport, including cartage to the wharf at Southampton, dues there, and boat carriage thence to Cowes and Newport, is not less than 8*s.* per ton, of which sum the cost of cartage to the wharf at Southampton is not less than 1*s.* 6*d.*, and the residue consists of the charges for wharf dues and the cost of boatage. The actual cost to the defendants of the conveyance of such goods from the Southampton station to Cowes and Newport, including carriage by the defendants' tramway from the Southampton station to the wharf at Southampton, dues there, and boat carriage thence to Cowes and Newport, does not average more than 5*s.* 4*d.* per ton, of which sum 4*d.* is the cost of the carriage by tramway from the station to the wharf, and the residue consists of a lump sum paid by the defendants by arrangement to the owners of steam boats and sailing ships or vessels conveying the goods, for wharf dues and cartage (*a*).

(*a*) The case also stated that the defendants carried goods for some of their customers resident at Cowes and Newport under special contracts in which the defendants charged lower rates those above mentioned.

1866.

BAXENDALE v. SOUTH WESTERN RAILWAY CO.

The plaintiffs allege that under the circumstances herein set forth the actual charge made by the defendants to their Cowes and Newport customers for the carriage of their goods from Nine Elms to Southampton station is only at the rate of 7*s.* per ton, and the plaintiffs therefore claim to be entitled to have their goods carried at a corresponding rate.

Between the 1st January and 26th March, 1864, the plaintiffs sent large quantities of goods consigned to themselves at Southampton, intended for Newport and Cowes respectively (but the actual destination was not declared to the defendants), by the defendants' railway from Nine Elms to Southampton station, where the plaintiffs received the same, and the plaintiffs were obliged to pay, and did pay, therefore, under protest, for these goods at the rates above mentioned. The plaintiffs now seek to recover back the difference between the amount so paid and the amount which they ought to have been charged for the same goods, and which is, as they contend, 7*s.* per ton.

The Court is to be at liberty, if it shall think fit, to draw inferences of fact.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover from the defendants the before mentioned sums, or any and what part thereof.

If the Court shall be of opinion in the affirmative, judgment is to be entered for the plaintiffs for such sum as the Court shall direct. If the Court shall be of opinion in the negative, judgment of non pros. is to be entered.

Bovill (*Digby* with him) argued for the plaintiffs (*a*). (Jan. 22).—First, the defendants are not entitled to charge the plaintiffs separately for parcels which form portions of one consignment, but are bound to charge for the whole

(*a*) Before *Pollock*, C. B., *Martin*, B., *Channell*, B., and *Pigott*, B.

consignment at a tonnage rate. The only difference between this case and that of "packed parcels" is that there the several parcels are made up into one package, here they are delivered separately, but included in one consignment note. [*Channell*, B.—If the parcels were packed in one box, there would be a packed parcel; so if all the parcels were tied together, there would be but one parcel; then has not the direction "Pickford & Co.," in the consignment note, the same effect as if they had been tied together?] It has. The defendants take from others of the public packages sent by one consignor to one consignee, and charge for the whole a tonnage rate, and therefore they have no right to charge the plaintiffs the small parcels rate. The names on the parcels of the persons to whom the plaintiffs intended to deliver them is no direction to the defendants, but a private mark of the plaintiffs. The defendants were bound to deliver the parcels to the plaintiffs at the station, not to the persons whose names and addresses were upon them. Where it is intended that the defendants should deliver a parcel to a person whose name is upon it, his name is inserted in the consignment note as consignee, and the plaintiffs do not put the label "Pickford & Co." on the parcel. [*Channell*, B.—Would it be a performance of the defendants' contract to deliver a parcel to the person whose name was upon it?] They have no authority to do so. [*Pigott*, B.—They know from the course of business that the label contains the direction to which they must attend.] The case is concluded by the authorities: *Pickford* v. *The Grand Junction Railway Company* (*a*), *Crouch* v. *The Great Northern Railway Company* (*b*), *Sutton* v. *The Great Western Railway Company* (*c*).

(*a*) 10 M. & W. 399. (*b*) 11 Exch. 742.
(*c*) 3 H. & C. 800.

1866.

BAXENDALE v. SOUTH WESTERN RAILWAY CO.

Secondly, the defendants are bound to make a deduction for the collection, delivery and cartage of goods, where those services are not performed by them. (*Wood*, for the defendants, stated that he did not intend to argue this point.)

Thirdly, the defendants are not justified in charging the plaintiffs for goods carried from the station at Nine Elms to Southampton the same rate as they charge other persons for carrying goods from that station to the Isle of Wight. A similar overcharge was attempted with respect to the collection, delivery and cartage of goods, and it was decided that the Company had no right to make it: *Pickford* v. *The Grand Junction Railway Company* (*a*), *Baxendale* v. *The Great Western Railway Company* (*b*), *Garton* v. *The Bristol and Exeter Railway Company* (*c*). [*Martin*, B.—The act of parliament requires that the Company shall charge all persons equally for carriage upon their line. The question in this case is not the same as that in *Pickford* v. *The Grand Junction Railway Company* (*a*). The cartage of goods from Camden Town to Cheapside must necessarily cost a considerable sum, and to the London Docks a greater sum, and when the Company charged Messrs. Pickford the same for goods delivered at Camden Town as they charged to a warehousekeeper for the goods delivered in Cheapside there was obviously an inequality of charge. But here the defendants charged the plaintiffs and all other persons alike for the carriage of goods from Nine Elms station to Southampton.] It is equally unreasonable to make the same charge to a person who receives goods at Southampton as to a person who requires them to be delivered at Cowes. [*Channell*, B.—The defendants fulfilled their contract by delivering the goods to the plain-

(*a*) 10 M. & W. 399.
(*b*) 14 C. B. N. S. 1; in error, 16 C. B. N. S. 137.
(*c*) 6 C. B. N. S. 639.

tiffs at Southampton, and then they became carriers, beyond their line to the Isle of Wight, which is authorized by their Act. The plaintiffs, having received the goods at Southampton, also became carriers to the Isle of Wight; but if the defendants are enabled, from circumstances, to carry to the Isle of Wight at a cheaper rate than the plaintiffs, why should they not have the benefit of that? *Martin*, B.—It is not a carriage by railway, but by another mode of conveyance. That is different from a delivery in London of goods which arrived at the Camden Town station. *Pigott*, B.—Can the delivery of goods at the Isle of Wight be called a delivery of goods carried from London to Southampton?] Suppose, in the case of *Pickford* v. *The Grand Junction Railway Company* (*a*), the goods, instead of being delivered in London, had been carried by a steam boat to Richmond, what difference would that have made in the principle of the decision? [*Pigott*, B.—Here the goods are not carried under the like circumstances, for they are only carried for the plaintiffs to Southampton, but for other people to Cowes.] There is an inequality of charge for the carriage between London and Southampton. Taking the lowest scale, the defendants charge 20*s.* per ton for the carriage to the Isle of Wight. That includes the costs of 5*s.* per ton for collection in London, and 5*s.* 4*d.* for delivering at Cowes, which, deducted from the 20*s.*, leave 9*s.* 8*d.* as the sum which they ought to charge the defendants for the carriage from Nine Elms station to Southampton, but, instead of that, they charge them 11*s.* 8*d.*—Again, the highest charge to the general public to Cowes is 26*s.* 8*d.*, and, if the two sums of 5*s.* and 5*s.* 4*d.* be deducted, the proper charge is 16*s.* 4*d.* for the carriage on the railway. The subject is elaborately discussed in the judgment of *Cockburn*, C. J., in *Baxendale* v. *The Great Western Railway Company* (*b*),

(*a*) 10 M. & W. 399. (*b*) 5 C. B. N. S. 309. 354.

1866.

BAXENDALE v. SOUTH WESTERN RAILWAY CO.

which is a conclusive authority that in this case there is an inequality of charge. It is clear that there must be a deduction in respect of the cost of collection, and the authorities shew that there must also be a deduction in respect of delivery beyond the limits of the railway? Then can the distance make any difference, or the mode in which the goods are conveyed?

Wood, for the defendants.—The first point has never been decided. It is not intended to impugn the case of *Sutton* v. *The Great Western Railway Company* (a), or the other decisions as to packed parcels. The law on that subject is clear, but this case is distinguishable. When the plaintiffs send parcels by the defendants' railway they deliver to them a ticking-off note, in which the weight of each parcel is stated. Other persons send goods to the defendants without any ticking-off note, and when the plaintiffs do so they are charged at the same rate. In all the decided cases there has been inequality. It is conceded that the defendants have a right to fix the charge; and it is found as a fact that for the carriage of goods between the stations they charge the defendants and the public in general at the same rate under similar circumstances. In the case of *Baxendale* v. *The Great Western Railway Company* (b) *Cockburn*, C. J., said that the Courts were reluctant to interfere with the mode in which railway Companies carried on their business, unless they were clearly satisfied that the Company was seeking to promote its own advantages by establishing an inequality. In *Baxendale* v. *The South Eastern Railway Company* (c) the facts were identical with those in the present case, with the exception of the label "Pickford & Co." upon the

(a) 3 H. & C. 544. (b) 5 C. B. 309. 352.
(c) 4 C. B. B. N. S. 63.

packages, and the Court held that the Company were entitled to make the charge. [*Channell*, B.—There the parties to the contract were the railway Company and the consignees: Pickford & Co. were merely the agents. Here the goods are consigned by the plaintiffs to themselves.]

With respect to the third claim, there is no complaint that the defendants charge the plaintiffs more than other persons for the carriage of their goods from Nine Elms station to the Isle of Wight; but the complaint is that the defendants charge their customers in the Isle of Wight less in proportion than they charge the plaintiffs for the carriage from Nine Elms station to Southampton. The defendants have a right to do so. They may make what contracts they think fit. They may charge less in proportion for a long distance on their line than for a short distance, provided they charge all persons alike under similar circumstances. They may also do the same where they carry beyond their line. In *Jones* v. *The Eastern Counties Railway Company* (*a*) the Court of Common Pleas refused to grant a rule under the Railway Traffic Act, 1854, to compel the defendants to issue season tickets between Colchester and London on the same terms as they issued them between Ipswich and London. *Hozier* v. *The Caledonian Railway Company* (*b*) is also an authority that a railway Company may charge less in proportion for carriage a longer than a shorter distance on their line. In *Garton* v. *The Bristol and Exeter Railway Company* (*c*) *Cockburn*, C. J., said that "it has never been held unreasonable to charge a lower rate for goods which have travelled a long way. And *Hill*, J., said:—"The goods for which the defendants charge less are such as have been carried by 'through traffic' from Manchester to Exeter, but the goods

(*a*) 3 C. B. N. S. 718. (*b*) 17 Scotch. Sess. Cas. 302.
(*c*) 1 B. & S. 112; 30 L. J. Q. B. 291.

1866.

BAXENDALE v. SOUTH WESTERN RAILWAY CO.

which the plaintiffs send from Bristol to Exeter are not so." *Crompton*, J., said:—"It is charging other people too little, nor you too much."] In all the cases which seem opposed to this view inequality was the principle of the decision, and it would be going a step further to hold that inequality is not a necessary ingredient. The defendants have a right to charge for the "through traffic" at a cheaper rate than from station to station, provided they charge all persons alike." [*Martin*, B.—The defendants have a railway from London to Southampton, and as a condition of granting it the legislature imposed on them the terms of carrying upon an equality. But then they carry to places beyond their line, and they choose to do that for a certain sum, including collection in London and delivery at the Isle of Wight. They offer to the plaintiffs to carry for them at the same rate, but the plaintiffs say, "We prefer carrying to the Isle of Wight ourselves, and we require you to carry for us from Nine Elms to Southampton. It is true you only charge us what you charge other persons for the carriage to Southampton, but we will analyze your charges to the Isle of Wight, and if by deducting what is reasonable for collecting in London and carrying from Southampton to the Isle of Wight, the residue is less than you charge us to Southampton, that is all we will pay you."] As regards London and Southampton there is no inequality, for there is no charge for collecting and carrying to Nine Elms station, but the charge is from that station to Southampton. Where it is a "through rate" the defendants are bound to allow a reasonable sum for collection and delivery. Here it is a "station to station rate." But there is in fact no disproportion in the charges. The defendants charge for the carriage of goods from London to Cowes and Newport uniform rates of 20*s.* and 26*s.* 8*d.* per ton, according to the classes of goods. The station to station rates are

11*s.* 8*d.*, 16*s.* 3*d.*, 19*s.* 7*d.* From the 20*s.* must be deducted the 5*s.* for collection. The defendants, having a tramway, are enabled to carry goods from the Southampton station to the wharf at 4*d.* per ton, while it costs the plaintiffs 1*s.* 6*d.*, and if 5*s.* 4*d.* be deducted from the 20*s.*, 14*s.* 8*d.* remains, which is not less in proportion to the whole distance than the plaintiffs are charged for the carriage from Nine Elms station to Southampton.

Bovill replied.

Cur. adv. vult.

CHANNELL, B., now said. — This is an action by the plaintiffs who carry on business as common carriers under the style or firm of Pickford & Co., against the London and South Western Railway Company, to recover the amount of certain overcharges, which the plaintiffs allege the defendants have made upon them, and which they have paid under protest. At the trial, before my brother *Martin*, a verdict was entered for the plaintiffs, subject to a special case, which has been argued before us in the present Term. My brother *Martin* went to Chambers before the argument was concluded, and therefore the judgment I am about to deliver must be considered as the judgment of the Lord Chief Baron, my brother *Pigott* and myself, although I believe my brother *Martin* concurs in our view.

The defendants carried on the business of common carriers upon their railway; and on their line between Nine Elms station, London, and Southampton, they carried goods delivered to them by the plaintiffs. Three specific claims are made on behalf of the plaintiffs, and we are to see whether they are entitled to recover beyond the amount paid into Court. The question turns on the Act which incorporated the Company, 4 & 5 Wm. 4, c. lxxxviii.,

1866.

BAXENDALE v. SOUTH WESTERN RAILWAY CO.

ss. 149, 155, 156 and especially 158, sometimes called the "equality clause," which contains a proviso that the Company shall not partially raise or lower the rates, tolls or sums payable "under this Act, but all such rates, tolls and sums shall be so fixed as that the same shall be taken from all persons alike under the same or similar circumstances." In actions against other railway Companies there have been decisions upon words the same, or nearly the same as this proviso. The case, having set out the material sections of the Act, states the heads of claim, and the grounds upon which each is made; and it then proceeds to state the facts on which the plaintiffs found their right to recover under each head.

The first head is "overcharges upon consignment of goods, by charging for their carriage rates according to the weight of packages contained in these consignments taken separately, instead of tonnage rate upon the whole of the consignments by the plaintiffs of the same class of goods." Under this head various particulars are stated, and it shews the way in which packages were entered in the ticking-off note, which was delivered by the plaintiffs to the defendants with each consignment—that they were sometimes addressed to the persons to whom the plaintiffs intended to deliver them, but always had upon them a label with "Pickford & Co., Guildford Station." It is not necessary, however, to recapitulate the facts in detail; it is sufficient to say that, having carefully considered them we are of opinion that, as regards the first head of claim, the case is within the authorities cited as to packed parcels, and that the plaintiffs are entitled to recover.

With regard to the second head of claim, the defendants' counsel very properly admitted that he could not support it, and therefore, upon that head, the plaintiffs are also entitled to recover.

The third head of claim is for "overcharges by charging upon goods carried for the plaintiffs by the defendants from Nine Elms to Southampton station, and thence to be forwarded by the plaintiffs to the Isle of Wight, rates which are higher than those charged to other persons under the same or similar circumstances." It appears that the defendants collected parcels in London, and carried them on their railway to their station at Southampton, and thence by means of a tramway to a wharf at Southampton; from whence, by means of steam-boats, they landed them on a wharf at Cowes or Newport, in the Isle of Wight. The defendants also carried for the plaintiffs from London to Southampton goods which the plaintiffs received at the Southampton station and delivered to their consignees at Southampton and in the Isle of Wight.

It is said that the cost which the defendants incurred in carrying goods from Southampton to the Isle of Wight by tramway and steam-boats was less than that necessarily incurred by the plaintiffs in carrying goods for their customers from Southampton to the Isle of Wight, and we are called upon to determine what would be a proper deduction from the defendants' charge for carriage under one contract for the receipt of goods in London and delivery of them at Newport, when they carry to Southampton only. We consider that the defendants are entitled to do what they profess to do, viz., to carry on the business of common carriers from London, or any place in London, to Newport or other places in the Isle of Wight, and to use their railway so far as it is available, that is from London to Southampton, and then to act as carriers beyond their line, from Southampton to the Isle of Wight.

Several cases were pressed upon us with the view of shewing that when a railway Company collects goods in

1866.

BAXENDALE v. SOUTH WESTERN RAILWAY CO.

London or its immediate neighbourhood, and delivers them free of charge at a station on their railway some little distance off, the collection in the first instance and the subsequent delivery free of charge constitute an equality as regards parties who are charged the ordinary rate fixed by the Company when taking upon themselves the duty of collecting and delivering goods. We abide by these decisions, but they are not applicable to the present case. In the decisions to which I refer, the collection and delivery of goods by the Company was auxiliary or subsidiary to their business, not as common carriers, but as carriers upon their line of railway. But when the defendants avail themselves of the opportunity of chartering steam-boats to carry goods from Southampton to the Isle of Wight, that is not subsidiary to their business as carriers upon their railway, but their real position is that they are common carriers from London to the Isle of Wight, availing themselves of their railway so far as it serves them for that purpose. Upon the facts stated we must regard what has been done as bonâ fide since there is no suggestion of mala fides, and so regarding it we think there is not necessarily an inequality. For these reasons we are of opinion that upon the first and second claims there must be judgment for the plaintiffs, but upon the third claim judgment must be entered for the defendants.

Judgment accordingly.

1866.

NOBLE *v.* WARD and Another.

Jan. 12.

The plaintiff agreed with the defendants in writing, signed by the defendants, to sell and deliver, at a future day, goods (above 10*l.* in value). Afterwards and before breach the time for performing the contract was verbally extended for a fortnight. *Held* (there being neither acceptance nor payment under the verbal arrangement) that the verbal arrangement was void and could not rescind the written contract, which the plaintiff might therefore enforce.

THE first count of the declaration stated, that it was agreed between the plaintiff and the defendants that the plaintiff would sell and deliver to the defendants, and that the defendants should accept from the plaintiff within a certain agreed period, which elapsed before suit, a large quantity of cloth at certain prices to be therefore paid by the defendants, and then agreed upon between the plaintiff and the defendants; yet the defendants refused to accept or pay for the said cloth, although afterwards and before suit all things were done and happened, and all times elapsed necessary to entitle the plaintiff to have the said goods accepted and paid for by the defendants, whereby the plaintiff lost the difference between the agreed price and the lower price to which the said goods fell.

Pleas.—First: A denial of the alleged agreement. Second: That the plaintiff was not ready and willing to deliver the said cloth within the said agreed period and therein made default. Fourth: That after the alleged agreement, and before any breach thereof, it was agreed by and between the plaintiff and defendants that the said agreement should be rescinded, and the plaintiff and the defendants then rescinded the same accordingly.—Issues thereon.

At the trial before *Bramwell*, B., at the Manchester Summer Assizes, 1865, the following facts appeared:—The plaintiff is a manufacturer at Great Harwood, and the defendants are merchants, carrying on busi-

1866.
NOBLE v. WARD.

ness in Manchester under the name of Ward, Armitage and Co. On the 12th of August, 1864, the defendants gave to the plaintiff an order in writing (signed by the defendants) for 500 pieces 32-inch grey cloth, &c., and 1000 pieces 35-inch grey cloth, &c., at specified prices, "to be delivered commence in three to four weeks, complete in eight to nine weeks," "same material, and as well made as sample piece delivered to-day." On the 18th of August, 1864, the defendants gave to John Hindle, the plaintiff's agent, a second order in writing (also signed by the defendants) for 500 pieces 32-inch grey cloth, &c., and 1000 pieces 35-inch grey cloth, &c., at specified prices, "to be delivered to follow on after order given 12th instant, and complete in ten to twelve weeks," "same materials, and as well made as sample pieces delivered on the 12th instant." On the 10th of September, 1864, the plaintiff made a first delivery to the defendants of 220 pieces on account of the first mentioned order, but the defendants refused to accept them, insisting that they were deficient in the reed. Afterwards, and prior to the 27th of September, 1864, the defendant made other deliveries on account of the first mentioned order, which were refused for the same reason.

On the 27th of September, 1864, the plaintiff and defendants agreed to rescind and do away with the first mentioned contract, to extend for a fortnight the time for the performance of the contract of the 18th of August, 1864, and that the plaintiff should take back the goods delivered under the first mentioned contract. The goods delivered as aforesaid under the first mentioned contract were accordingly taken back by the plaintiff.

On the 14th of October, 1864, the plaintiff delivered to the defendants 130 pieces of the said 35-inch cloth.

On the 15th of October, 1864, the defendants wrote

to the plaintiff, and the plaintiff received the following letter:—

"Mr. Mark Noble.

"Victoria Mill, Great Harwood.

"Dear Sir,

"We received yesterday an invoice for 130 pieces, 35-inch, &c. You should have delivered 150 pieces as per agreement with you September 27th; and, as you have not done so, we must be under the necessity of cancelling the order. We may add that even if delivered as agreed we could not take such goods as you have sent, for they are not yet a 20 reed.

"Yours, &c.,

"Ward, Armitage & Co."

On the same day the plaintiff wrote to the defendants, and the defendants received the following letter:—

"Messrs. Ward, Armitage & Co.

"Gentlemen,

"The time to commence delivering the order taken August 18th is not due until the 21st instant, according to the agreement made with you on September 27th. The cloth is a 20 reed.

"Yours, &c.,

"Mark Noble."

On the 21st of October, 1864, the plaintiff tendered 220 pieces more, and afterwards and before the 17th of November, 1864, he tendered the remainder of the 1500 pieces mentioned in the order of the 18th of August, 1864, but the defendants refused to accept any of them.

The learned Judge being of opinion that the contract of the 18th of August was rescinded by the parol alteration of the 27th of September, and that the contract, as altered, not being in writing, could not be enforced, directed a nonsuit to be entered.

1866.
NOBLE v. WARD.

Mellish, in last Michaelmas Term, obtained a rule nisi for a new trial, on the ground that the plaintiff was entitled to recover on the contract of the 18th of August, 1864, citing *Moore* v. *Campbell* (*a*); against which

Holker and *Baylis* shewed cause (*b*).—The written contract of the 18th of August having been varied by parol, that variation necessarily rescinds the contract. It is true that the contract, as altered, cannot be enforced by action, but it is not the less a subsisting contract: *Goss* v. *Lord Nugent* (*c*), *Stead* v. *Dawber* (*d*). Lord *Denman*, in the latter case, expressly said, that in contemplation of law the altered contract subsists, though the statute intervenes, and takes away the remedy upon it. That a party may waive the performance of a term in a contract without rescinding the contract itself is not denied. And that distinguishes *Moore* v. *Campbell* (*a*), on which the plaintiff relied in moving for the rule, from *Stead* v. *Dawber* (*d*). But here, as in *Stead* v. *Dawber* (*d*), the subsequent arrangement by parol essentially varied the written contract. The time for delivery being extended, the time for payment is extended with it. That amounts to an absolute rescission of the original contract, whereas in *Moore* v. *Campbell* (*a*), *Parke*, B., said, that the parties never meant to rescind the original contract absolutely. There the intention to rescind the original contract was contingent on the new contract being performed. But that can only be so where the new contract is to be performed before or at the same time as the original contract. Convenience is against the plaintiff's contention. That the parol agreement is not absolutely void is clear, since part payment or part

(*a*) 10 Exch. 323.

(*b*) Nov. 18. Before *Pollock*, C. B., *Bramwell*, B., *Channell*, B., and *Pigott*, B.

(*c*) 5 B. & Ad. 58.

(*d*) 10 A. & E. 57.

delivery would set it up. Can its operation as a rescission of the written contract depend on the circumstance of part payment or part delivery? The declared intention of the parties being to extend the time for payment and delivery, it is plainly contrary to that intention that even before the extended time has elapsed, either party should be able to turn round and sue on the original contract. Yet that is the inevitable result, if the original contract be not rescinded.—They also argued that the plaintiff was not ready and willing to deliver under the contract of the 18th of August, and cited *Hoare* v. *Rennie* (*a*).

Mellish, in support of the rule.—The question raised is, whether, where the Statute of Frauds requires a contract to be in writing, every material alteration of the written contract by parol necessarily rescinds it. If so, the intention of the parties is liable to be defeated by the most trivial alteration, the only enforceable contract being thereby annulled. The language of the 17th section of the Statute of Frauds differs materially from the language of the 4th section. The 4th section takes away the remedy on such parol contracts as come within its terms, but the 17th section affects the validity of the contract itself. The 17th section enacts that no contract for the sale of goods for the price of £10 or upwards, of which there is no written memorandum, "shall be allowed to be good," unless certain acts are done, which here are not. But if the parol alteration cannot be allowed to be good to create a new contract, why should it be allowed to be good to rescind the old one. To give it that operation would be to defeat the intention of the parties, for they never intended rescission except on the terms of the contract, as altered, being performed. And that intention is only evidenced by the abortive attempt to make a new

(*a*) 5 H. & N. 19.

1866.
NOBLE v. WARD.

contract. [*Bramwell*, B.—Suppose the written contract was for wine of a particular brand, and afterwards the parties agreed by parol that the wine should be of a different brand, would that alteration rescind the written contract?] That case would differ from the present, since there the subject-matter of the contract is changed. With regard to the authorities, *Moore* v. *Campbell* (*a*) is the only case directly in point. The absence of other authorities is not surprising, since neither party is in general prepared to carry out the original contract. *Goss* v. *Lord Nugent* (*b*), and *Stead* v. *Dawber* (*c*), only shew that the altered contract cannot be enforced, not that the original contract is rescinded. On the other hand, in *Moore* v. *Campbell* (*a*), the action was brought on the original contract which was in writing, and the plea was that it was rescinded. There, as here, the evidence shewed an alteration by parol of the term relating to delivery. The Court, while granting a new trial on another point, delivered on this point a considered judgment for the guidance of the Judge upon the new trial. And *Parke*, B., said, "If a new *valid* agreement substituted for the old one before breach would have supported the plea, we need not inquire, for the agreement was void, there being neither note in writing, nor part payment, nor delivery, nor acceptance of part or all." That case is directly in point. *Smith* v. *Hudson* (*d*), also supports the view, that until acceptance the parol agreement is void.—On the second point he argued that the goods were tendered in sufficient time under the contract of the 18th of August, and urged that a nonsuit could not be supported on a ground not taken at the trial.

Cur. adv. vult.

(*a*) 10 Exch. 323.
(*b*) 5 B. & Ad. 58.
(*c*) 10 A. & E. 57.
(*d*) 34 L. J. N. S. Q. B. 145.

CHANNELL, B. now read the judgment of

BRAMWELL, B. (*a*).—This case was tried before me at Manchester and the plaintiff was nonsuited. The case comes before us on a rule to set aside that nonsuit. I think it was wrong, at least on the ground on which it proceeded. The action was for not accepting goods on a sale by the plaintiff to the defendants. The defendants pleaded among other things that the contract had been rescinded and that the plaintiff was not ready and willing to deliver.

The facts were, that a contract for the sale and delivery of goods from the plaintiff to the defendants at a future day, was entered into on the 12th of August, which may be called contract A. That another contract for sale and delivery by plaintiff to defendants, also at a future day, was entered into on the 18th of August, say contract B. That before any of the days of delivery had arrived the plaintiff and defendants agreed verbally to rescind or do away with contract A. and to extend for a fortnight the time for the performance of contract B.; that is to say, the plaintiff had a fortnight longer to deliver, and the defendants a fortnight longer to take and pay for those goods. This, on principle and authority, was a third contract; call it C. It was a contract in which all that was to be done and permitted on one side, was the consideration for all that was to be done and permitted on the other. See per *Parke*, B. in *Marshall* v. *Lynn* (*b*). It remains to add that the declaration would fit either contract B. or contract C., and that goods were tendered by the plaintiff to the defendant in time for either of those contracts.

My note and my recollection of my ruling are, that contract B. was rescinded, and contract C. not enforceable not being in writing. I think that was wrong. Either

(*a*) See post, p. 157. (*b*) 5 M. & W. 117.

1866.
NOBLE v. WARD.

contract C. was within the Statute of Frauds or not. If not there was no need for a writing. If, yes, it was because it was a contract for the sale of goods, and so within the 17th section of the statute. That says that "no contract for the sale of goods for the price of 10*l.* or upwards shall be *allowed to be good* except" there is an acceptance, payment or writing. The expression "allowed to be good" is not a very happy one; but whatever its meaning may be, it includes this at least, that it shall not be held valid nor enforced. But this is what the defendant was attempting to do. He was setting up this contract C. as a valid contract. He was asking that it should be allowed to be good to rescind contract B.

It is attempted to say that what took place when contract C. was made was two-fold.—First, the old contracts were given up, secondly, a new one made. But that is not so, what was done was all done at once, was all one transaction, one bargain, and had the plaintiff asked for a writing at the time, and the defendants refused it, it would all have been undone and the parties remitted to their original contracts. I think, therefore, that on principle it was wrong to hold the old contract was gone. *Moore* v. *Campbell* is an authority to the same effect. It is true that case may be distinguished on the facts, viz., that there what was to be done under the new arrangement in lieu of the old was to be done at the same time, so that it might well be the parties meant not that the new thing should be done, but if done should be in lieu of the old. Such an argument could not be used in this case. But it was not the ground of the judgment there, which is that the new agreement was void. The cases of *Goss* v. *Lord Nugent*, *Stead* v. *Dawber* and others, only show that the new contract C. cannot be enforced, not that the old contract B. is gone. I think it was not. Inconvenience and absurdity

may arise from this. For instance, if the defendants signed the new contract and not the plaintiff, the plaintiff would be bound to the old, and the defendants to the new, or if in the course of the cause a writing turned up signed by the plaintiff, then they would first rely on the old and afterwards on the new contract. But this is no more than may happen in any case within the 17th section, where there has been one contract only.

But then it was said before us that the plaintiff was not ready and willing to deliver under contract B. Probably not, and he supposed contract C. was in force. In answer to this, the plaintiff contended before us this point was not made at the trial, to which the defendants replied, neither was the point that the old contract was in force. My recollection is so, that the case was opened and maintained as on the new contract; but I agree with Mr. *Mellish* a nonsuit ought to be maintained on a point not taken at the trial, only when it is beyond all doubt. I cannot say this is. Consequently, I think the rule should be absolute, but under the circumstances the costs of both parties of the first trial ought to abide the event of the second.

CHANNELL, B., said.—I am authorized by the Lord Chief Baron and my brother *Pigott* to say that the judgment, which I have read as the judgment of my brother *Bramwell*, is one in which we all agree.

Rule absolute.

1866.

Jan. 29.

A Judge has power, under the 1 & 2 Vict. c. 110, s. 14, to order shares in a joint stock Company to stand charged with payment of a judgment debt recovered against the registered owner of the shares, although he holds them as trustee only.

CRAGG *v.* JOHN TAYLOR.

ON the 31st of August, 1865, judgment was signed in this action against the defendant for 198*l.* 1*s.* 1*d.* On the 4th of November following *Martin*, B., made an order at Chambers, under the 1 & 2 Vict. c. 110, s. 14, that fifty shares in the Glynrhonwy Slate Company (Limited), registered in the name of the defendant, do stand charged with payment of that amount.

The affidavit in support of the order stated that the Glynrhonwy Slate Company was incorporated in March, 1860, under the Joint Stock Companies' Act, 1856; and that by a deed of transfer under the hands and seals of Vernon Taylor, a registered shareholder in the Company, and the defendant, dated the 12th July, 1865, Vernon Taylor, in consideration of 10*s.* paid to him by the defendant, bargained, sold, assigned and transferred to the defendant fifty shares in the Company; and on the 11th September the deed of transfer was duly registered in the books of the Company.

Cole, in the present Term, obtained a rule calling on the plaintiff to shew cause why the order of *Martin*, B., should not be rescinded. The affidavits in support of the application stated that the fifty shares were transferred to the defendant as trustee for his brother, Vernon Taylor, and in order that the defendant might be a director of the Company for the support of his brother's interest, and that the defendant had not any beneficial interest whatever in such shares.

McIntyre now shewed cause.—The order was correctly

made under the 1 & 2 Vict. c. 110, s. 14 (*a*). The defendant's name is inserted in the register of shareholders of the Company; and by the Joint Stock Companies Act, 1856 (25 & 26 Vict. c. 89, s. 23), every person who has agreed to become a member of the Company, and whose name is entered on the register of members, shall be deemed to be a member of the Company. The defendant having held himself out as a member cannot defeat a judgment creditor by setting up a secret trust. By sect. 30, "no notice of any trust, express, implied, or constructive, shall be entered on the register, or be receivable by the registrar." The words in the 1 & 2 Vict. c. 110, s. 14, "standing in his own name *in his own right*," mean "in his own *legal* right," not as an executor, &c. In *Fuller* v. *Earle* (*b*), where the shares were registered in the name of the defendant, it was held that they were properly charged, as "standing in his own name in his own right," although he had executed a transfer of them, and delivered it together with the certificates to the transferee. [*Channell*, B.—The 43rd section provides for the entering mortgages upon the register.]

(*a*) Enacts:—"That if any person against whom any judgment shall have been entered up in any of her Majesty's superior Courts at Westminster shall have any government stock, funds, or annuities, or any stock or shares of or in any public Company in England (whether incorporated or not) *standing in his name in his own right or in the name of any person in trust for him*, it shall be lawful for a Judge of one of the superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor: Provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

(*b*) 7 Exch. 796.

1866.
CRAGG v. TAYLOR.

Baker v. *Tynte* (*a*) shews that whatever the nature of the interest, and however uncertain as to its extent, it is chargeable. [*Martin*, B.—By section 14 the order entitles the judgment creditor to all such remedies as he would be entitled to if such charge had been made by the judgment debtor; therefore all that the judgment creditor obtains is a charge in equity, and a Court of equity must determine whether the judgment debtor has any beneficial interest which could be charged.]

H. T. Cole, in support of the rule.—The legislature could never have intended that shares standing in the name of a trustee should be charged with his judgment debts. Shares in joint stock Companies are frequently the subject of marriage settlement, and if a Judge has power to charge them whenever a judgment is recovered against the trustees, the cestui que trust will be driven to a Court of equity to get rid of the charge. The 1 & 2 Vict. c. 110, s. 14, is carefully framed to prevent that mischief by giving a power to charge only when the shares are standing in the name of the judgment debtor *in his own right*. [*Pollock*, C. B.—Would not a trustee be liable in an action for calls?] He would be estopped from saying that he was not the holder of the shares; but in the case of a charging order the question is whether the person in whose name the shares are registered has any beneficial interest in them. [*Pigott*, B.—Can this Court inquire into that?] The 30th section contemplates a trust, because it provides that no notice of any trust shall be entered on the register. By the 14th section shares standing in the name of a trustee for the judgment debtor may be charged for his debts, but they cannot be charged for the debts of the trustee.

(*a*) 2 E. & E. 897.

POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. In *Rogers* v. *Holloway* (*a*), a case not precisely the same as this, but in which the question was as to the power of a Judge to charge stock standing in the names of trustees for the defendant, *Tindal*, C. J., said: "If we entered into the matter, it appears we should have to settle a complicated question of equity, and that we cannot do."

I should have come to the same conclusion without reference to the case of *Rogers* v. *Holloway*. The 25 & 26 Vict. c. 89, s. 25, requires every Company under that Act to keep a register of its members; and the 43rd section requires them to keep a register of mortgages; but the 30th section says that "no notice of any trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the registrar." From that we may infer that, although there may be an inquiry as to whether shares are held by a mortgagee, it was never intended that we should enter into the question whether shares are held by the apparent owner as trustee for some other person. As in an ordinary partnership a Court of law must assume that each member of the firm is a partner in his own right, whatever equities there may be in this case we cannot take them into consideration.

MARTIN, B.—I am of the same opinion. Although my original impression was against the order, I am now satisfied that it was rightly made, and ought not to be set aside. Looking at the act of parliament, it is plain that the object of the legislature was that the names of all the members of the Company should appear upon the register, that is, that the register should express who were the partners in the Company, without saying whether or not the relation

(*a*) 5 M. & G. 292.

1866.
CRAGG v. TAYLOR.

of trustee and cestui que trust existed. The 30th section says that no notice of any trust shall be entered on the register, or be receivable by the registrar, that is, in substance, that no notice of any trust shall be taken by the managing body.

The facts are these.—The real owner of these shares, being unwilling to interfere in the management of the Company, transferred them to the defendant, in order that he might be a director, and support the interest of the real owner. A judgment has been recovered against the transferee of the shares, and it is contended that they cannot be charged with the amount of the judgment debt because the debtor is not the real and beneficial owner of them. It is not necessary to consider whether a Court of equity would permit the real owner of the shares to place a mere nominal person on the register whose poverty, perhaps, may have caused him to be selected; it may be that the legislature never meant that it should be done, but however that may be no injury can arise from this order. The 1 & 2 Vict. c. 110, s. 14, authorizes a Judge of one of the superior Courts to make an order charging stock or shares of or in any public Company standing in the name of a judgment debtor "in his own right" or in the name of a trustee for him. In my opinion the words "in his own right" mean in his own name, not as an executor. Then the section goes on to say that "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." Therefore all this order does is to give the plaintiff a right to insist in a Court of equity that he is entitled to the same benefit as if the judgment debtor had made the charge. That question could not be raised if we set aside this order. If the judgment creditor would have had any rights under a charge

made by the judgment debtor this order enables him to enforce them in a Court of equity; if he would have had no such rights the order does not confer them upon him. I entertain no doubt that the proper course is to let the order stand.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. This is an application to set aside an order of my brother *Martin* under the 1 & 2 Vict. c. 110 (taken in connection with the 25 & 26 Vict. c. 89), which enables a Judge to charge shares in a public Company standing in the name of a judgment debtor "in his own right," or in the name of a trustee for him. There may be cases which might present some difficulty, but the short ground of my opinion is that these shares are standing in the name of the defendant in a public Company, so as to put it in the power of a Judge to charge them, and therefore primâ facie the charging order is right.

The order is sought to be impeached on the ground that the shares were transferred into the name of the defendant by his brother for the purpose of protecting his interest in the Company. But whether the true nature of the transaction is such that the defendant is a trustee and holds the shares for a particular purpose only, and that, being a trustee, he committed a breach of trust by allowing a judgment to be recovered against him, so that the shares became charged, a Court of law cannot take these matters into consideration. I am satisfied that the order was right, although the defendant may be responsible for having caused a charge upon trust property. No proceedings can be taken to have the benefit of the charge until the expiration of six months from the date of the order; so that there is abundant time for any person who claims an equitable interest in these shares to establish his right. I am

1866.
CRAGG v. TAYLOR.

confirmed in this view by the principle of the decision in *Rogers* v. *Holloway*, which in my opinion is correct.

PIGOTT, B.—I agree with the rest of the Court, and am satisfied that the order of my brother *Martin* is right. As to whether the relation of trustee and cestui que trust may be created with respect to these shares, I give no opinion: that is a question for a Court of equity to determine. I think the principle laid down by *Tindal*, C. J., in *Rogers* v. *Holloway* governs this case. A doubtful state of facts may arise upon affidavits, and we ought not, by discharging the order, to preclude the parties from trying the question in a Court of equity.

Rule discharged.

Jan. 17.

THE RAMSGATE VICTORIA HOTEL COMPANY, LIMITED, *v.* MONTEFIORE.

THE SAME *v.* GOLDSMID.

MONTEFIORE *v.* THE RAMSGATE VICTORIA HOTEL COMPANY, LIMITED.

Where an application is made for shares in a joint stock Company the directors are bound to allot them within a reasonable time, otherwise the allottee may refuse to accept them, and recover back the deposit, whether or not he has withdrawn his application.

Shares applied for on the 8th June were allotted on the 23rd November.—*Held*, not an allotment within a reasonable time.

IN the first of the above actions, the declaration stated that, before suit, to wit, on, &c., the defendant, having then paid to the plaintiffs' bankers the sum of 50*l.*, as and by way of a deposit on application of 1*l.* per share on fifty shares in the said Company, in consideration thereof, and that the plaintiffs, at the request and on the application of the defendant, would allot to him fifty shares of 20*l.* each

in the said Ramsgate Victoria Hotel Company, Limited, the defendant agreed to accept such shares, or any smaller number of shares that might be allotted to him, and to pay the deposit and calls thereon, and to sign the articles of association of the Company at such time and in such manner as the directors of the said Company might appoint.—Averments: that before this suit, in pursuance of the said application and request of the defendant, the plaintiffs did allot to the defendant fifty shares of and in the said Ramsgate Victoria Hotel Company, Limited, and the deposit and call payable and agreed by the defendant as aforesaid to be paid on such allotment was and is the sum of 4*l.* per share, amounting to the sum of 200*l.*, of all which the defendant had due notice: Yet the defendant, although often requested so to do, and although all things have happened &c., necessary to entitle the plaintiffs to have and recover the said sum of 200*l.*, being the said deposit and call of 4*l.* per share on allotment of the said fifty shares to the said defendant in the said Company, and to entitle the plaintiff to maintain this action, yet the defendant did not nor would accept the said shares, and did not nor would pay the deposit and call thereon, &c.

Pleas (inter alia).—Fifthly: that before the plaintiffs allotted to the defendant any of the said shares, the defendant withdrew his said application for the said shares, and gave notice to the plaintiffs that he withdrew his said application, and that he abandoned and renounced the said agreement, which said notice the plaintiffs received before the making of the said allotment; and the defendant then, as he lawfully might, refused to accept the said shares and to pay the said deposit and calls, which is the breach of agreement complained of.

Sixthly.—That the plaintiffs did not, within a reasonable time in that behalf, allot to him any of the said shares;

1866.

RAMSGATE VICTORIA HOTEL CO. v. MONTEFIORE.

and the defendant, before any such allotment, and after such reasonable time as aforesaid had elapsed, withdrew, and gave notice to the plaintiffs that he withdrew, his said application for the said shares, and the defendant then, as he lawfully might, refused to accept the said shares, and to pay the said deposit and calls, which is the breach of agreement complained of.

Seventh.—That the plaintiffs did not, within a reasonable time in that behalf, give notice to the defendant that they had allotted to him any of the said shares, and he, the defendant, after such reasonable time as aforesaid had elapsed, and before the giving to him by the plaintiffs of any such notice, withdrew, and gave notice to the plaintiffs that he withdrew, his said application, and then the defendant, as he lawfully might, refused to accept the said shares and to pay the said deposit and calls, which is the breach of the agreement complained of.—Issues thereon.

By consent a special case in each action was stated for the opinion of this Court (so far as material) as follows:—

The plaintiffs in the first mentioned action are a Company completely registered, on the 6th June, 1864, under the Companies' Act, 1862, and articles of association were also registered on the same day.

On the 8th June, 1864, the defendant in the first mentioned action applied to the directors of the Company for fifty shares by the following letter:—

"To the Directors of the Ramsgate Victoria Hotel
"Company, Limited.

"Gentlemen,

"Having paid to your bankers the sum of 50*l.*, I hereby request you will allot me fifty shares of 20*l.* each in the Ramsgate Victoria Hotel Company, Limited, and I hereby agree to accept such shares, or any smaller number

that may be allotted to me, to pay the deposit and calls thereon, and to sign the articles of association of the Company, at such time and in such manner as you may appoint.

"I am, Gentlemen,

"Moses Montefiore."

Prior to the said application the defendant had paid to the Company's bankers 50*l.* as stated in the above letter, and had received from them a receipt in the following form:—

"Received the 8th day of June, 1864, on account of the directors of the Ramsgate Victoria Hotel Company, Limited, the sum of 50*l.*, being the deposit paid in accordance with the terms of the prospectus, on an application for an allotment of fifty shares in the said undertaking."

At a meteing of the directors, on the 17th of August, 1864, the secretary made out and submitted to the board the list of applicants for shares up to that time, amongst whom appeared the name of the defendant, Montefiore.

At a meeting of the directors, on the 2nd of November, the following minute was entered: "The secretary submitted the list of subscribers, but it was not deemed advisable to proceed to an immediate allotment."

Afterwards, and before the 23rd of November, the secretary prepared another list of subscribers and applicants for shares, which shewed opposite the defendant's name fifty shares in the column of shares applied for, and fifty shares in the column of shares allotted.

Between the month of June, 1864, and the receipt of the letter of the 23rd November, hereinafter mentioned, the defendant received no direct reply to his application for shares, nor any express notice of allotment, nor any information or communication whatever from the directors or secretary or agent of the Company, and he

1866.

RAMSGATE VICTORIA HOTEL CO. v. MONTEFIORE.

consequently, on the 8th November, 1864, wrote to the directors of the Company the following letter:—

"Gentlemen,

"The allotment of shares in this Company not having been made, I now withdraw my application for fifty shares, made some months since, and request that you will return to me the sum of 50*l.*, being the deposit paid by me to the bankers of the Company. At the same time I beg to inform you that I shall decline to accept any shares in the Company (if allotted), or to sign the articles of association.

"I am, Gentlemen,

"Your obedient Servant,

"M. H. Montefiore."

No reply to this letter having been received, on the 18th November, 1864, the defendant's solicitors wrote to the plaintiffs requesting the return of the 50*l.*

On the 23rd November, 1864, the directors passed a resolution that notice be given to all shareholders that the directors do hereby make the first call of 4*l.* already due on the allotment of their shares.

The defendant's name is on the register, or alleged register, for fifty shares, and notice of the same was given to the defendant, on the 23rd November, 1864, by the following letter:—

"Sir, "Secretary Department.

"I am instructed by the directors to acquaint you that in compliance with your application they have allotted to you fifty shares in this Company, and have entered your name in the register of shareholders for the same, and I have to request that you will pay the balance of the first call, as noted below, on or before the 15th day of De-

cember, to the London and County Bank, 21, Lombard Street.

"I am, Sir,
"Your obdt. Servt.,
"H. Winfield Crace."

"Number of shares 50
"Deposit . £50
"Further payment on allotment . } £200
£250."

The solicitors of the defendant wrote in reply requesting that his name should be forthwith removed from the register of shareholders, and that the deposit should be returned.

The question for the opinion of the Court in the first mentioned action is, whether, under the above circumstances, the Company are entitled to maintain their action for the said sum of 200*l.*, balance of deposit, or any other sum.

In the second of the above mentioned actions the facts are the same, except that the defendant has never at any time withdrawn his application, or given notice of any intention to do so.

The question for the opinion of the Court is the same.

The third of the above mentioned actions is brought to recover back the deposit of 50*l.* paid by the plaintiff to the bankers as above stated, and also for damages for not duly allotting.

The facts are the same, mutatis mutandis, as the first mentioned action, and the question for the opinion of the Court is, whether the plaintiff in the third mentioned action is entitled to maintain it for any and what amount.

Mellish (*Digby* with him), for the plaintiffs in the two

1866.

RAMSGATE VICTORIA HOTEL CO. v. MONTEFIORE.

first above mentioned actions, and for the defendant in the third.—With respect to the first action, it is conceded that the defendant had no notice of the allotment of shares prior to his withdrawal of his application for them; and he contends that there could be no binding contract until he had notice that his application was accepted. But the question is, whether in fact there has been an allotment of shares to him, and that depends upon what, in point of law, constitutes an allotment. It is submitted that the insertion of the defendant's name in the lists of subscribers amounted to an allotment. [*Martin*, B.—The defendant says, "Having paid to your bankers 50*l.*, I request you will allot me fifty shares, and I hereby agree to accept them, or any smaller quantity that may be allotted to me;" then the plaintiffs ought, within a reasonable time, to have informed the defendant that they acceded to his application.] No doubt, in ordinary cases, an assent to a proposal is necessary to constitute a binding contract, and the assent must be given within a reasonable time; but that rule cannot apply to an allotment of shares, for the directors must necessarily wait to see how many shares are applied for before they can allot them. In *Bloxam's Case* (*a*) an applicant for shares paid the deposit and his name was entered as an allottee in a book called the "register of allotment of shares," but no notice of the allotment was sent to him, and Sir *J. Romilly*, M. R., held that he was a shareholder. On appeal that decision was affirmed (*b*), and *Turner*, L. J., said, "I think that the contract became perfect and binding upon the appellant when the allotment was made, and that notice of the allotment was not necessary to perfect the contract." *Cookney's Case* (*c*) is an authority to the same effect. [*Pollock*, C. B.—In those cases the question was whether the allottee was liable as

(*a*) 33 Beav. 529. (*b*) 33 L. J. Chan. 574.
(*c*) 26 Beav. 6.

1866.

RAMSGATE VICTORIA HOTEL CO. v. MONTEFIORE.

a contributory, which is very different from the question as to his liability for calls. A creditor may well say, "You have consented to become a shareholder and therefore ought to contribute when the Company is wound up." *Martin*, B.—On the 8th November the defendant withdrew his application for shares, and no allotment was made until the 23rd November.] In the second of the above mentioned actions, the defendant never withdrew his application for shares.

Montague Chambers (with whom was *Cohen*) appeared for the defendants in the two first actions, and for the plaintiff in the third, but was not called upon to argue.

Per CURIAM (*a*).—We are all of opinion that the defendants in the two first actions are entitled to judgment. In the other action our judgment is for the plaintiff.

Judgment accordingly.

(*a*) *Pollock*, C. B., *Martin*, B., *Channell*, B., and *Pigott*, B.

JOURDAIN *v.* PALMER.

Jan. 11.

In an action for the breach of an agreement to pay the stamp duty on letters patent, whereby they became void, and the plaintiff lost the profits thereof, the Court refused to allow the defendant to administer interrogatories to the plaintiff for the purpose of shewing that the letters patent were of no value.

THE declaration in this case set out an agreement in writing, dated the 10th April, 1862, between the plaintiff of the one part and the defendant of the other part, whereby, after reciting that the plaintiff was possessed of an invention for deodorising oleaginous substances, it was agreed that the plaintiff should, at the defendant's costs, which the defendant thereby agreed to pay, take all necessary steps to obtain provisional protection and

1865.
JOURDAIN v. PALMER.

letters patent for the said invention, and the necessa specification thereof; such letters patent to be assigned t the plaintiff to the defendant: the plaintiff to use h utmost endeavours to promote the adoption of the sa invention, and make the same productive by using it his own manufactory, and granting licenses for the u thereof to other persons upon such terms as to royalty should be agreed upon between the plaintiff and tl defendant: the defendant to receive all monies due ar payable in respect of the said invention, which should l applied first in repayment to the defendant of all costs, &c that if, within two calendar months from the date of tl provisional protection the defendant should give writt notice to the plaintiff of his intention not to proceed wi the said letters patent, then all his right and interest in tl said invention should cease, and it should thenceforth l the sole property of the plaintiff: provided that if tl defendant should not give such notice, he should be bour to pay the cost of proceeding with and obtaining tl letters patent.—Averments: that, after the making of t agreement, to wit, on the 10th April, 1862, provisior protection was obtained for the said invention, and t defendant did not, within two calendar months from th date, give written notice to the plaintiff of his intenti not to proceed with the said letters patent; and that, aft the expiration of the said two calendar months, and aft the obtaining of the said letters patent, and before t commencement of this suit, it became and was necessa for the purpose of proceeding with the said letters pate in the terms of the said agreement, and preventing t avoidance thereof under the provisions of the 16 & Vict. c. 5, s. 2, to pay 50*l.* for stamp duty in respect of t said letters patent before the expiration of the 10th Jur 1865, and that all conditions, &c., had been performed.

Breach: that the defendant did not pay the stamp duty, whereby the letters patent became void, and the plaintiff lost divers profits which he would have derived from working the patent.

Plea.—Payment into Court of 50*l.*

The defendant took out a summons at Chambers for leave with his plea to deliver to the plaintiff the following interrogatories:—

1. Have you ever made, or caused to be made, any and what quantity of material under the patent the subject of this action? If yea, state the several quantities, and the date of such manufacture, and the places at which it was manufactured.

2. What quantity of such material is now in your power or possession? If you have disposed of any part of it, state in detail what quantity you have disposed of, and to whom, stating his present address, and when and for what consideration, and how much consideration has been received by you, and when.

3. Have you in your power or possession any and what diaries, documents, or books containing memoranda and entries of the quantity manufactured by you, the dates or other particulars of its disposal, or the prices received for the same, as in the last interrogatory particularly mentioned? If yea, give the name and description of each of such diaries, memoranda, or books.

4. Did you receive any, and what, samples of material manufactured by the defendant under the said patent, and when? What has become of the same? Are any, and, if yea, how many, at present in your possession or power?

5. Did you constantly exert yourself to the utmost of your ability from the 10th April, 1862, till the commencement of this action, to obtain orders for material manufactured by the said process?

1866.
JOURDAIN v. PALMER.

6. Have you been able to obtain a single order? And if yea, state the name and address of the person or persons from whom you obtained such order, and the date and amount of it.

The affidavit in support of the application stated that the defendant had reason to believe that the plaintiff had attempted to procure persons to take licenses of the said patent, but without success. That the defendant had from time to time, caused to be given to the plaintiff samples of the material produced by the said patent, but the plaintiff had not procured a single customer for it, nor accounted to the defendant for any monies received by him in respect of it, as he was bound to do under the said agreement, if he had received any; nor did the defendant know what had become of such samples. That defendant was informed and believed that the plaintiff had, from time to time, manufactured, or caused to be manufactured, cocoa-nut oil according to the said patent, or by some other process, but defendant was ignorant in what quantities he had done so, or when, and what amount, if any, he had realised by means of it: that the defendant would derive material benefit in this cause from the discovery which he seeks by the interrogatories, and that he had a good defence upon the merits.

The summons was heard before *Channell*, B., who refused to make an order; whereupon

Murphy now moved for a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to deliver to him the above interrogatories.—The defendant would be entitled in a Court of equity to the information now sought, and, if so, he is entitled at law under the 51st section of the Common Law Procedure Act, 1854. The defendant admits a breach of the agreement, and seeks, by these interrogatories, to ascertain what sum he ought to

pay into Court. The affidavit shews that the invention is of little or no value; and that samples have been delivered to the plaintiff which have not been accounted for. If they have been disposed of by the plaintiff, the defendant is entitled to an account of the proceeds; if they have not, that fact would be evidence that the invention is worthless. *Wright* v. *Goodlake* (*a*) is an authority that a defendant may interrogate a plaintiff for the purpose of ascertaining the damage he has sustained, so as to enable the defendant to pay the real amount into Court. [*Martin*, B.—That was an action for the infringement of the plaintiff's copyright in a pamphlet, and the discovery was limited to the number of copies sold on a certain day and two months before and two months after that day. An application was once made to me at Chambers to allow a railway Company to interrogate a person injured on their railway as to his age, profession, income, his movements after the accident, the doctors whom he consulted, the nurse who attended him, and every circumstance connected with his own case, but I refused to sanction it.] In that case the defendants would not have been entitled to a discovery in equity. [*Channell*, B.—Assuming that, under this agreement, the defendant would be entitled to a discovery in equity, it does not follow that he is entitled to it in this action. *Wright* v. *Goodlake* was an action of tort; this is an action for a breach of contract. Suppose, in such an action, special damage was alleged, would the defendant be entitled to interrogate the plaintiff respecting it?]

POLLOCK, C. B.—I am of opinion that my brother *Channell* was right in refusing the order. I doubt whether the decision in *Wright* v. *Goodlake* can be followed on every occasion where it may appear applicable. That was an

(*a*) 3 H. & C. 540.

action for an infringement of the plaintiff's copyright in a pamphlet, and no doubt the criterion of damage was the value of the pamphlet: and the object of the interrogatories was to shew that so few copies had been sold that scarcely any damage had been sustained. Mr. *Murphy* contends that because a Court of equity would, for some purposes, allow the proposed questions, we ought to allow them in this action. Now, I doubt whether these interrogatories would be allowed by a Court of equity, except for the purpose of taking an account between the parties, so as to settle their separate rights. That cannot be done in this action. In my opinion neither the rule to be collected from *Wright* v. *Goodlake*, nor the rules to be collected from the practice of Courts of equity, apply to this case.

Martin, B.—In my opinion, to allow these interrogatories would be to contravene the rule that a party is entitled to a discovery of such material facts as relate to his own case, but not to a discovery of the manner in which his adversary's case is to be established, or to evidence which relates exclusively to his case. This is an action for a breach of contract, to which there is a plea of payment of 50*l.* into Court. The object of these interrogatories is to discover whether or not certain material has been sold under this patent, and the plaintiff is unfairly called upon to state his case. Without saying that in no case ought interrogatories to be allowed for the purpose of ascertaining what damage has been sustained, I have heard nothing in this case to induce me to think that my brother *Channell* was wrong in his decision.

Pigott, B.—I am of the same opinion. The object is to discredit the plaintiff's case: and if the answers sought for were obtained, I doubt whether it would necessarily follow that the patent was of no value.

CHANNELL, B.—I also think, on further consideration, that I was right in refusing to allow these interrogatories. This is an action for a breach of contract in not paying a stamp duty of 50*l.*; and in respect of that some damage has occurred. A plaintiff may be called on to disclose his case where the matters to which the interrogatories relate are evidence of his case *in common* with that of the defendant. Such is the rule at common law. There may be cases in which a discovery can be obtained in equity, although not at law; and I am far from saying that if an account had existed between the parties, the defendant would not have had a locus standi in a Court of equity to compel the plaintiff to render an account of all the monies which he had received under the patent.

As to the question whether a Judge is bound to allow interrogatories upon the ground that a discovery might be obtained in equity, I am of opinion that the interrogatories must be ad rem with reference to the action in which it is sought to deliver them, and not with reference to a matter not raised by the pleadings. The defendant has paid 50*l.* into Court, and no doubt the replication will be that the plaintiff has sustained damages ultra. This is an application to administer interrogatories in order to ascertain the damages, and which I think ought not to be allowed.

Rule refused.

1866.

Jan. 16.

ROE *v.* BRADSHAW.

In the affidavit filed with a bill of sale the deponent swore to the description of the grantor's residence and occupation "to the best of his belief:" —*Held*, that the use of these words did not affect the description, which was sufficient within the 17 & 18 Vict. c. 36, s. 1, if its truth in fact was not impeached.

THIS was an action against the sheriff of Surrey for not levying under a writ of fieri facias, and for a false return, the only question on the pleadings being as to the sufficiency of the sum paid into Court.

At the trial, before *Bramwell*, B., at the London Sittings after Michaelmas Term, 1865, the defence set up for not levying on certain of the goods seized, was that the judgment debtor had assigned them by bill of sale before the writ of fieri facias issued. The affidavit of the attesting witness, filed with the bill of sale in pursuance of the 17 & 18 Vict. c. 36, s. 1, contained the following passage: —"The said Horatio Cowne" (the maker of the bill of sale) "resides, *to the best of my belief*, at No. 38, Harley Road, Kennington, and is a job-master." It was objected to the affidavit that a description of residence and occupation in this form was not a compliance with the 17 & 18 Vict. c. 36, s. 1.

The learned Judge, being of opinion that the affidavit was sufficient, directed a verdict for the defendant, with leave to the plaintiff to move to enter the verdict for him.

M. Chambers now moved accordingly.—The requirements of the 17 & 18 Vict. c. 36, s. 1, have not been complied with. To satisfy that statute the affidavit filed along with the bill of sale must contain "a description of the residence and occupation" of the maker of the bill of sale. Here the affidavit is defective in this, that the deponent does not pledge his oath to the description, but only deposes *to the best of his belief*. The statute requires a

positive statement, and does not authorize any such qualification. Moreover, as the affidavit is worded, perjury could not be assigned if it afterwards turned out that the deponent had no belief on the subject. [*Pollock*, C. B. —I cannot accede to that. The words of the affidavit import that the deponent has a belief. *Martin*, B.—Substantially, is not the statute satisfied? If the description were in fact untrue you might contend that there was no description; but if you do not impeach the truth of the description, what is the objection to the affidavit?] Extrinsic evidence cannot be prayed in aid of the description to supply its defects: *Pickard* v. *Bretz* (*a*). For the prevention of fraud the legislature has required this description, and it must be construed strictly: *Tuton* v. *Sanoner* (*b*). The legislature intended that it should be founded on actual knowledge, and not on mere hearsay, and such a requirement imposes no hardship. At nisi prius loose evidence can be tested on cross-examination, but no such test can be applied to this affidavit.

POLLOCK, C. B.—I think there should be no rule. The 17 & 18 Vict. c. 36, s. 1, requires that together with every bill of sale there shall be filed "an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same." This affidavit states the time of making the bill of sale, and describes, *to the best of the deponent's belief*, the occupation and residence of the maker. The question is, whether, the truth of that description not being impeached, it sufficiently complies with the terms of the enactment. I think it does. A statement made on oath to the best of the deponent's belief imports that he is

(*a*) 5 H. & N. 9. (*b*) 3 H. & N. 280.

1866.
ROE
v.
BRADSHAW.

acquainted with the subject to which he deposes, and that he is entitled to form, and has formed, a belief upon it. The Court is not to surmise the deponent guilty of the equivocation of deposing to the best of his belief when in reality he has no belief. The supposed danger of allowing this affidavit is that it may introduce a lax practice, and encourage unscrupulous persons to equivocate. But if any one were to endeavour to shelter himself behind such an equivocation, he would find that he could not do so with impunity.

MARTIN, B.—I am of the same opinion. The question is, has the act of parliament been complied with? For, if so, we ought not to require more. The Act requires an affidavit of the time of the bill of sale being made, and a description of the residence and occupation of the maker. This affidavit does contain a description of residence and occupation which is not suggested to be untrue. Mr. *Chambers* contends that no one whose testimony on cross-examination might turn out to be hearsay is competent to make an affidavit under this act of parliament; but that is more than the Act says.

CHANNELL, B.—I also think, though not without some doubt, that this is a sufficient affidavit. The words are "an affidavit of the time of such bill of sale being made or given"—that has been complied with—"and a description of the residence and occupation of the person making or giving the same." Thus there is a change of phraseology in the latter part of the sentence, the words there not being "an affidavit of the description," but simply "a description." Now this affidavit does contain "a description," and although the words "to the best of my belief" accompany it, I think that, the other requirements of the Act

being complied with, there is also a sufficient description within the Act.

BRAMWELL, B.—At the trial I reserved this point because I thought it a new form of affidavit, and one which perhaps might afford opportunity for evasion. On consideration I think the Lord Chief Baron's view right. No affidavit can be construed to mean more than that, in the belief of the deponent, the statements in it are true; and a deponent's belief is in reality identical with the best of his belief. A deponent who swears to the best of his belief substantially swears that he has a belief, and that it is what he states. I am not so clear that this form of affidavit may not introduce laxity. Persons may be found who, though unwilling to swear that they "believe," will hope to escape under the quibble of swearing "to the best of their belief." However, although I think this point was one to be reserved, I am glad the Court concur in my view that it is an insufficient objection.

Rule refused.

COOK *v.* JAGGARD and Others.

Jan. 23.

A will made before 1838 contained the following clause, "*all* the rest of my worldly estate, *both real and personal*, I give, devise and bequeath as follows." The will then contained a devise of a copyhold estate to the testator's daughter, W., in tail, and concluded thus:—"And all the rest, residue and remainder of my personal estate and effects wheresoever and whatsoever, and of what nature, kind or quality soever the same may be, moneys, securities for money, *or whatever I may be possessed of or entitled to at the time of my decease*, I give and bequeath the same to my said daughter" W., "to and for her sole use and benefit absolutely."—*Held*, that the reversion in fee in the copyhold estate expectant on the determination of the estate tail was undisposed of, and passed to the heir.

EJECTMENT.—The defendant John Jaggard defended, the other defendants not appearing.

At the trial, before *Pigott*, B., at the Essex Summer Assizes, 1865, the following facts appeared:—In the year

1866.
Cook
v.
Jaggard.

1803 Nathaniel Cook, the plaintiff's great uncle, being seised in fee simple in possession of the two copyhold estates hereinafter mentioned situate in the parish, and holden of the manor, of Chich St. Osyth in the county of Essex, surrendered them to the uses of his will, and afterwards, in the year 1808, made his will (dated the 13th of October, 1808, and duly attested to pass real property), the material parts of which are as follows:—"I Nathaniel Cook, of the parish of Chich Saint Osyth, in the county of Essex, farmer, &c., do make, publish and declare this my last will and testament in manner and form following, that is to say, first, I desire that all my just debts, funeral expenses, and the expense of proving this my last will and testament be paid out of my personal estate and effects, and *all the rest of my worldly estate, both real and personal, I give, devise and bequeath as follows:* I give and *devise* to my daughter Susanna Cook Westbroom, spinster, natural child by my late housekeeper Elizabeth Westbroom deceased, all that my copyhold messuage, hereditaments, lands and premises, with all the appurtenances thereunto belonging, situate, lying and being in the parish of Chich St. Osyth aforesaid, and now in the occupation of John Bird, to have and to hold the said copyhold messuage, hereditaments, lands and premises to my said daughter Susanna Cook Westbroom, and to the heirs of her body lawfully to be begotten, according to the custom of the manor in which the same is holden." [Then followed a similar devise of another copyhold estate in the same parish in the testator's occupation, to the same Susanna Cook Westbroom and the heirs of her body.] "And all the rest, residue, and remainder of my personal estate and effects, wheresoever and whatsoever, and of what nature, kind or quality soever the same may be, monies, securities for money, *or whatever I may be possessed*

of or entitled to at the time of my decease, I give and bequeath the same to my said daughter Susanna Cook Westbroom to and for her own sole use and benefit absolutely, &c. In witness whereof, &c." The testator died on the 20th of October, 1808, without having altered his will, being at the time of making his will and at his death seised as aforesaid of the two copyhold estates mentioned in his will, which form the subject of the present action. Susanna Cook Westbroom, having intermarried with Benjamin Jaggard, was, in September 1809, admitted to the said copyholds as tenant in tail according to the custom of the manor of Chich St. Osyth, of which the same were holden, and afterwards, in January, 1817, died, leaving two surviving children, both of whom died under age, and without issue, prior to August, 1821. In August, 1821, Benjamin Jaggard was admitted to the said copyholds as tenant by the curtesy according to the custom of the said manor, and continued in possession up to the time of his death in November, 1864, when the defendant, John Jaggard, his son by a second marriage, took possession of the premises. The plaintiff was the heir of Nathaniel Cook. A verdict was entered for the plaintiff under the direction of the learned Judge, leave being reserved to move to enter the verdict for the defendant.

Philbrick, in Michaelmas Term, 1865, obtained a rule nisi accordingly, on the ground that, on the true construction of the will of Nathaniel Cook, the whole of his estate in the copyhold premises in question passed to the devisee, and that there was no intestacy as to the reversion after the estate tail created in her favour.

M. Chambers and *A. L. Smith* shewed cause.—The plaintiff claims the premises in dispute as the heir of the testator,

1866.
Cook
v.
Jaggard.

and on two grounds.—First, he contends that the residuary clause in the will does not carry real estate. It will be urged, perhaps, that general expressions are to be found in the residuary clause sufficiently comprehensive for that purpose. But such expressions, when used in connection with words unequivocably descriptive of personal estate, must, agreeably to the maxim noscitur a sociis, be restricted by that association: Jarman on Wills, 3rd ed., vol. 1, p. 681, *Doe* dem. *Bunny* v. *Rout* (*a*), *Woollam* v. *Kenworthy* (*b*), *Monk* v. *Mawdsley* (*c*). In the last case Sir *J. Leach*, V.C., expressly relied on the words "all I may die possessed of at the time of my death" as importing that the testatrix had only personal estate in her contemplation, observing that the words "possessed of," in their ordinary sense, did not import real estate, and the words "at the time of my death" would have no sense as applied to it. Here the testator, by using the word "devise" when disposing of his real estate, has shewn that he knew how to dispose of it in apt language. The inference is, that when in the residuary clause he substituted the word "bequeath" he intended to dispose only of personalty.—Secondly, assume the residuary clause to embrace realty as well as personalty. The will being made prior to the 7 Wm. 4 & 1 Vict. c. 26, the language of the residuary clause is not such as to pass the fee, but only a life estate, and that estate is determined. In Jarman on Wills, 3rd ed., vol. 2, p. 247, the rule which applies to the present case is thus stated:—"Nothing is better settled than that a devise of messuages, lands, tenements or hereditaments (not estate), without words of limitation, occurring in a will which is not subject to the newly enacted rules of testamentary construction, confers on the devisee an estate for life only, notwithstanding the

(*a*) 7 Taunt. 79. (*b*) 9 Ves. 137
(*c*) 1 Sim. 286.

testator may have commenced his will with the declaration of an intention to dispose of his whole estate, &c." That rule of construction is well settled, and governs the present case.

Philbrick, in support of the rule.—The defendant contends that the residuary clause in the testator's will carried realty, and that the remainder in fee in the copyholds in dispute passed under it. The cardinal rule of interpretation in wills is, that the intention of the testator is to be respected, provided there are words in the will capable of giving effect to it. Now, as regards the testator's intention, the whole scope of this will shews the intention to have been to dispose of everything both real and personal. Then, are there words in the will capable of carrying it out? If, indeed, the residuary clause stood alone, it may be conceded that, although its terms are sufficiently comprehensive to pass real estate, the maxim noscitur a sociis would apply, and restrict the meaning of general words of which the import is equivocal. But when, as in this case, the testator has previously expressed a clear intention to dispose of his whole estate, real as well as personal, and not to die intestate as to any part of it, the Court will, in favour of the intention, give the largest interpretation to words whose meaning, if in itself equivocal, is clearly explained by what has been previously expressed. As regards the words "bequeath" and "possessed," which occur in the residuary clause, and have been commented on as primarily appropriate to personalty, the clause in question runs thus: "Whatever I may be possessed of or entitled to, &c.," "I give and bequeath;" and "give" and "title" are both words primarily appropriate to realty. Moreover, if authority be wanted, *Hogan* v. *Jackson* (*a*) shews that

(*a*) 1 Cowp. 299.

1866.
COOK
v.
JAGGARD.

under the words "give and bequeath" realty will pass. *Monk* v. *Mawdsley* (*a*) has been cited on the other side, but it is in the defendant's favour. There the will contained no such introductory clause as here, and Sir *J. Leach*, V. C., in pronouncing judgment, expressly said that the words used might have been sufficient to pass real estate if from other parts of the will such had appeared to have been the intention of the testatrix; and the reasoning of the judgment is directly based upon the circumstance that the will contained no such expression of intention. On the other hand *Wilce* v. *Wilce* (*b*) is a distinct authority that under words almost identical with the words here used the fee will pass. [*Martin*, B.—In that case it was not necessary to decide whether an estate in fee passed, or only a life estate.] The use of express words is not necessary to disinherit the heir; it is sufficient, for that purpose, that the devise contains tantamount expressions clearly indicative of an intention to dispose of *all* the testator's property: *Hogan* v. *Jackson* (*c*), *Smith* v. *Coffin* (*d*). The circumstance that an interest in land is previously devised specifically is in the defendant's favour. In Jarman on Wills it is expressly laid down that that circumstance always favours the extension of the subsequent general words to property of the same description: Jarman on Wills, 3rd ed., vol. 1, p. 691.—He also referred to *Woollam* v. *Kenworthy* (*e*) and *Doe* d. *Andrew* v. *Lainchbury* (*f*).

POLLOCK, C. B.—I am of opinion that this rule should be discharged. Reading the whole will together, I think it plain, although the earlier part appears to indicate an

(*a*) 1 Sim. 286.
(*b*) 7 Bing. 664.
(*c*) 1 Cowp. 299.
(*d*) 2 H. Bl. 444.
(*e*) 9 Ves. 137.
(*f*) 11 East, 290.

intention on the testator's part to dispose of all his property, that, if any such intention existed, the language used is not capable of giving it effect. The introductory clause has this expression "I give, devise and bequeath as follows;" and then the testator proceeds to "give and *devise*" two copyhold estates to Susanna Cook Westbroom and the heirs of her body. Then follows the residuary clause, in which the testator does not, as before, give and *devise*, but gives and *bequeaths* "all the rest, residue and remainder of my personal estate wheresoever and whatsoever, and of what nature, kind or quality soever the same may be." So much of the clause is manifestly confined to personalty. Then what follows is a description of it, in which the testator enumerates "monies, securities for money, or whatever I may be possessed of or entitled to at the time of my decease;" the particle "or" connecting the more specific words of description "monies, securities for money," with the more general words of description which follow after. That, I think, is the true construction of the passage, and its effect is to confine the words "whatever I may be possessed of or entitled to at the time of my decease" to property ejusdem generis with that which precedes —consequently to personal estate. In *Wilce* v. *Wilce* (*a*) the clause "everything else I die possessed of" was not preceded, as here, by the word "or," but by the word "and," pointing, therefore, not to a further description, but to a new head of property. Supposing, however, the residuary clause did apply to realty, it would by no means follow that it carried the fee. In *Wilce* v. *Wilce* (*a*) all that was decided was that *some* real estate passed under the residuary clause, though no doubt it is said by some of the Judges extrajudicially that the fee passed. That case, however, does not appear to me so much in point as *Monk* v. *Mawds-*

(*a*) 7 Bing. 664.

1866.
COOK v. JAGGARD.

ley (*a*), where the words "all I may die possessed of at the time of my death" were held not to apply to real estate. Here, from the whole tenour of the will, I think that the residuary clause is restricted to personalty.

MARTIN, B.—I agree that under the residuary clause in this will the remainder in fee did not pass.

CHANNELL, B.—I am of the same opinion. Mr. *Philbrick* admits that this rule cannot be made absolute unless the residuary clause passed the fee. I think it did not and but for the authority of *Wilce* v. *Wilce* (*b*) I should have thought the case clear. *Wilce* v. *Wilce*, however when carefully examined, is no authority as to the fee passing, though that it did pass in that case would seem to have been the opinion of one, if not of two, of the Judges. But, upon looking at the question there submitted to the Court, it will be found that whether the defendant took an estate for life or in fee was a point which it was not necessary to determine. If he took either it was sufficient there, but it is not so here. Then it is urged that in the commencement of the will the testator has shewn an intention to dispose of the entirety of his interest Now although I admit that the introductory clause might in that respect, assist the defendant's contention, I cannot think that in itself it is sufficient to induce us to adopt it. The Lord Chief Baron has intimated that *Monk* v. *Mawdsley* (*a*) is nearer than *Wilce* v. *Wilce* (*b*) to the present case, and in that I agree.

PIGOTT, B., concurred.

Rule discharged.

(*a*) 1 Sim. 286. (*b*) 7 Bing. 664.

1866.

DYER *v.* BEST.

Jan. 16, 18, 19.

The 31 Eliz. c. 5, s. 5, includes penal actions where the penalty is given to a common informer alone, and, therefore, he must sue within one year after the offence comitted.

A witness may refresh his memory as to the day on which certain proceedings at which he was present took place, by referring to a newspaper containing a report of those proceedings, and which he read at the time the facts were fresh in his recollection, and then knew that they were correctly reported.

THE declaration stated, that before and at the time of the committing by the defendant of the offences hereinafter mentioned, the defendant claimed to be and was one of the Commissioners appointed by virtue of "The Town of Burton upon Trent Act, 1853," of and for the said town and borough of Burton upon Trent, for putting into execution the aforesaid act of parliament, and acted as such Commissioner. And the plaintiff avers that after the defendant became and was and acted as such Commissioner as aforesaid, he became disqualified to act in the said office, to wit, by reason of the defendant, while he was and acted as such Commissioner as aforesaid, being personally concerned and participating in a certain contract made between the aforesaid Commissioners of the said town and borough of Burton-upon-Trent of the one part and the defendant and another of the other part, for work to be done under the authority of the aforesaid Act, and by the defendant participating in the profits of the said contract, and of the work done thereunder and under the authority of the said Act. Yet the defendant, after the passing of the said Act, and after he had in manner aforesaid become disqualified from acting as such Commissioner as aforesaid, did, on, &c. (stating six days in the year 1862, four days in the year 1863, and four days in the year 1864) act as such Commissioner as aforesaid at the several meetings of the said Commissioners then respectively held under and by virtue of the said Act, contrary to the form and provision of the said statute: Whereby the defendant forfeited, and became, and was, and is, liable to pay to the

1866.
DYER v. BEST.

plaintiff, who sues the defendant for the same in this action under the said statute, the sum of 50*l.* for each and every time he so acted and offended.

Pleas.—First: not guilty (by stat. 21 Jac. 1, c. 4, s. 4).

Second.—That the alleged causes of action did not accrue within a year before this suit.

The plaintiff joined issue on the pleas, and also demurred to the second plea.

At the trial, before *Channell*, B., at the last Staffordshire Summer Assizes, it appeared that the action was brought under "The Commissioners Clauses Act, 1847" (*a*), (10 & 11 Vict. c. 16), to recover penalties in respect of the defendant having, whilst disqualified, acted as a Commissioner under "The Town of Burton upon Trent Act, 1853" (16 & 17 Vict. c. cxviii.), with which "The Commissioners Clauses Act, 1847," is incorporated. The defend-

(*a*) Sect. 9 :—"Any person who at any time after his appointment or election as a Commissioner shall accept or continue to hold any office or place of profit under the special Act, or be concerned or participate in any manner in any contract, or in the profit thereof, or of any work to be done under the authority of such Act, shall thenceforth cease to be a Commissioner, and his office shall thereupon become vacant."

Sect. 15.—"Every person who shall act as a Commissioner, being incapacitated or not duly qualified to act, or before he has made or subscribed such declaration as aforesaid, or after having become disqualified, shall for every such offence be liable to a penalty of fifty pounds; and such penalty may be recovered by any person, with full costs of suit, in any of the superior Courts; and in every such action the person sued shall prove that at the time of so acting he was qualified, and had made and subscribed the declaration aforesaid, or he shall pay the said penalty and costs, without any other evidence being required from the plaintiff than that such person had acted as a Commissioner in the execution of this or the special Act; nevertheless, all acts as a Commissioner of any person incapacitated, or not duly qualified, or not having made or subscribed the declaration aforesaid done previously to the recovery of the penalty, shall be as valid as if such person had been duly qualified.

ant carried on the business of a carpenter and builder in partnership with one Bowler, and at various times between the years 1859 and 1865 they were employed by Commissioners to do work for which they were paid. The plaintiff proved that he was present at a board meeting of the Commissioners in July, 1860, and that the defendant was also present at that meeting, and acted as a Commissioner. The plaintiff also stated that the defendant attended board meetings, and acted as a Commissioner on the 3rd of September, 1862, the 6th May, 1863, the 6th of January, 1864, the 3rd of February, 1864, and the 24th June, 1864. On cross-examination, the plaintiff stated that he had no recollection of the particular days on which the defendant acted as a Commissioner; but he had a recollection of seeing the defendant so acting on several occasions, and he regularly took in a weekly newspaper which contained reports of what took place at the meetings of the Commissioners, and whenever there was a report of the proceedings at meetings at which he was present he used to read it. He made no memorandum at the time; but by referring to those newspapers, which he had ever since kept, he was enabled to fix the particular days on which the defendant acted as a Commissioner. The defendant's counsel submitted that the witness was not at liberty to refresh his memory by referring to these newspapers, but the learned Judge overruled the objection, and admitted the evidence.

The present action was commenced on 24th of February, 1865.

The learned Judge left it to the jury to say, first, whether the defendant acted as a Commissioner; secondly, whether, whilst he so acted, he participated in the profits of work done for the Commissioners (telling the jury that if he did he thereby became disqualified); and, thirdly,

1866.
DYER v. BEST.

whether, after his disqualification, he continued to act as a Commissioner, and so acted within one year before the commencement of this action.

The jury found that whilst the defendant acted as a Commissioner he became disqualified, and that, being disqualified, he continued to act as a Commissioner on four different occasions, three before the year immediately preceding the commencement of this action, and one within that year; but they did not find the date when he first ceased by disqualification to be a Commissioner, or the respective dates when, being disqualified, he acted as a Commissioner.

It was submitted on behalf of the defendant that, by the 31 Eliz. c. 5, s. 5, an action by a common informer for a penalty must be brought within one year after the offence committed, and therefore only one penalty could be recovered.

A verdict was then entered for the plaintiff for 200*l.*, being the amount of four penalties; and leave was reserved to the defendant to move to reduce the amount to 50*l.*

Gray, in the following Term, moved for a rule nisi accordingly, and also for a new trial on the ground of misdirection in the learned Judge not limiting his direction to penalties which might be incurred before any re-election of the defendant, and also on the ground of the improper reception of evidence.—The learned Judge ought not to have allowed the witness to refresh his memory by referring to the newspapers. A witness may refresh his memory by looking at memoranda made by himself or some person in his presence; but here the witness made no memorandum whatever at the time he read the newspapers. [*Pollock*, C. B.—If a man, at the time he has a recollection of certain facts, reads a document containing a statement, which he knows to be true, of those facts, he may again

refer to it to refresh his memory, although at the time he first read it he made no memorandum.]

Per CURIAM (a).—We are all of opinion that upon this point there ought to be no rule (b).

Rule refused upon this point, granted upon the other points.

Huddleston and *H. Matthews* shewed cause.—First, as to the reduction of the verdict. The plaintiff is not limited to causes of action arising within a year before suit, since the 5th section of the 31 Eliz. c. 5 does not apply. That section applies to two classes of penal actions: first, where the forfeiture is to the Queen, her heirs or successors, only, in which case the period of limitation is two years next after the offence committed: secondly, where the forfeiture is "to the Queen, her heirs or successors, *and* to any other which shall prosecute in that behalf," such prosecutor being limited to one year next after the offence committed, and the Queen, "in default of such pursuit," to two years "after that year ended." The case where the whole forfeiture is limited to the informer would seem to be a casus omissus, but at all events it is not within the words of the section. Nor can the words of the section be made to apply by reading the word "and" in its second branch distributively. For if, where the whole forfeiture is limited to the informer, that branch of the section applies, it must also apply where the whole forfeiture is limited to the Queen. But that

(a) *Pollock*, C. B., *Bramwell*, B., *Channell*, B., and *Pigott*, B.

(b) In *Burrough* v. *Martin*, 2 Camp. 112, Lord *Ellenborough* ruled that a witness might refresh his memory by referring to entries in a book which he did not write with his own hand, but which he regularly examined from time to time soon after they were written, and while the facts stated in them were fresh in his recollection.

1866.
DYER v. BEST.

would conflict with the first branch of the section, which has previously prescribed two years as the period of limitation for such a forfeiture. [*Pollock*, C. B.—The concluding part of the 31 Eliz. c. 5, s. 5, is in the widest terms:—"If *any* action, suit, . . . or information for *any* offence against *any* penal statute made or to be made, except the statute of tillage, shall be brought after the time in that behalf before limited, that then the same shall be void and of none effect, &c."] That by its terms is limited to cases in which the statute has already prescribed the period of limitation. Prior to the 31 Eliz. c. 5 it does not appear to have been the practice of the legislature to award the whole penalty to the informer, which may account for the omission to prescribe a period of limitation when the penalty is so awarded. [*Pollock*, C. B., referred to the 7 Hen. 8, c. 3.] The construction of that statute may be doubtful, but at all events it has since been repealed. The authorities are in the plaintiff's favour. In *Culliford* v. *Blandford* (*a*) two points were discussed in the Court of King's Bench. The present point is noticed by several reporters, and according to their reports (*a*) all the Judges seem to have agreed that, where the whole penalty is limited to the informer and nothing to the King, the 31 Eliz. c. 5 does not apply. The statement in Carthew that the action was qui tam is an obvious mistake (*b*). It is true that in *Culliford* v. *Blandford*, as reported in 4 Mod. 129 (see also *Rex* v. *Gall* (*c*)), it is said that the point decided was that the plaintiff was no common informer. That, however, clearly only means, as stated in the report in Shower,

(*a*) Carth. 232; Comb. 194; Show. 353, 354; 4 Mod. 129. [*Pollock*, C. B., referred to Clarke's Bibliotheca Legum, 355, where the authority of Comberbach's and Carthew's Reports is impugned.]

(*b*) In 1 Ld. Raym. 78, it is also stated that the action was qui tam.

(*c*) 3 Salk. 200.

pp. 353, 354, no common informer within the 31 Eliz. c. 5, since the plaintiff was confessedly a stranger, and not the party grieved. *Culliford* v. *Blandford* afterwards went into error, as appears from the report of *Chance* v. *Adams* (*a*). There (referring to *Culliford* v. *Blandford*, in error) it is said:—"Upon error in the Exchequer Chamber it was resolved by the majority of the Judges then present there that, where the informer ought to have the whole penalty, the stat. of 31 Eliz. does not extend to it, because it is not within the words of the Act, and penal Acts are not extendible by equity." It is true that the case of *Lookup* v. *Frederick*, as cited in Tidd's Practice, 9th ed., p. 15, and Buller's Nisi Prius, 194 b, is a conflicting authority, but Buller's statement of that case, from which Tidd quotes, does not agree with the report of the case in error, 4 Burr. 2018.—They also referred to Comyn's Digest, tit. "Information" (A. 1).—[Secondly, they argued that there was no misdirection, contending that if the defendant went out of office, and was afterwards re-elected, the onus was on him to prove it.]

Gray and *Staveley Hill*, in support of the rule.—First, the 31 Eliz. c. 5 requires an action of this kind to be brought within one year after the offence committed. By the 7 Hen. 8, c. 3, the limitation in actions for penalties given to the King only was four years, while qui tam actions by common informers, and actions for a penalty given to a common informer alone, were limited to one year, and by the King to three years. That statute was repealed by the 31 Eliz. c. 5, which limited the time for penal actions by the Queen only to two years, and by common informers to one year. The legislature could never have

(*a*) 1 Ld. Raym. 77.

1866.
DYER v. BEST.

intended, when it put a further restriction on the Crown, to enlarge the time which common informers previously had. [*Pollock*, C. B.—The 18 Eliz. c. 5, s. 1, which includes all actions by common informers upon penal statutes, required a special note to be made upon the information of the very day, month and year of exhibiting it, so as to ascertain with certainty when the suit was commenced. The 31 Eliz. c. 5, following that enactment, must have been intended to restrain, not enlarge, an informer's power.] The 21 Jac. 1, c. 4, intituled "An Act for the ease of the subject concerning informations upon penal statutes," requires such informations to be prosecuted in the counties where the offences were committed: sect. 1. By sect. 3 the informer must make oath that the offence was committed in the county where the suit is commenced, "and that he believeth in his conscience the offence was committed within a year before the information or suit." That statute applies to actions by a common informer suing alone; and it assumes that such actions must be brought within a year after the offence. By the 3 & 4 Wm. 4, c. 42, s. 3, actions for penalties by the party grieved are limited to two years. In Com. Dig. "Information" (A. 1) it is said that "by the 31 Eliz. c. 5 an information, where the penalty is given to the Queen, shall be brought in two years after the offence; if to the Queen and the prosecutor in two years after the year allowed to the common informer." And again, tit. (A. 3), "By the 31 Eliz. c. 5 an information shall be by a common informer within one year after the offence committed (unless on the statute of tillage)," &c. In *Culliford* v. *Blandford* (*a*) there were two questions, first, whether the plaintiff was a common informer within the 31 Eliz. c. 5;

(*a*) 4 Mod. 129; 12 Mod. 26; Holt. 522; 1 Show. 353; Comb. 194; Carth. 232.

secondly, whether the suing out the latitat was a commencement of the action; and it would seem from the report in Holt, p. 522, that the decision was upon the latter point only. In a note to the report of the case in 4 Mod. 129 it is said that a writ of error was brought upon the judgment, but it does not appear whether it was affirmed or reversed. The case was cited in *Chance* v. *Adams* (*a*), and from a note there it would appear that three of the Judges present at the argument of *Culliford* v. *Blandford* in the Exchequer Chamber were of opinion that the judgment ought to be reversed. [*Martin*, B.—*Culliford* v. *Blandford* (*b*) is not cited in 2 Wms. Saund. 63, note 6, by which it would seem that the learned editor considered it overruled.] In Buller's Nisi Prius, 194 b, it is said that on a case reserved the Common Bench decided that a common informer must sue within the year, "for such action would have been within the 7 Hen. 8, and the 31 Eliz. was made to narrow the time given by that statute, and therefore could never mean to leave any actions unrestrained in time: the latter part of the clause must therefore be construed to extend to them: *Lookup*, q. t., v. *Sir T. Frederick*." In that case the declaration contained two counts, the first for a penalty incurred more than a year before the commencement of the action, and the second for a penalty incurred within the year; and the special case mentioned in Buller's Nisi Prius has reference to the first count, for the plaintiff had judgment on the second count, and the defendant having brought error on that judgment it was affirmed as to the recovery of the debt, and reversed as to the damages and costs: *Frederick* v. *Lookup* (*c*). In Tidd's Practice,

(*a*) 1 Ld. Raym. 77.

(*b*) 4 Mod. 129; 12 Mod. 26; Holt, 522; 1 Show. 353; Comb. 194; Carth. 232.

(*c*) 4 Burr. 2018.

1866.
DYER v. BEST.

p. 14, 9th ed., it is said:—"Where the penalty is given to a common informer alone, different opinions have been entertained whether it is within the statute. On the one hand it has been said that this is not a case within the words of the Act, which ought to be taken strictly, and not extended by an equitable construction. On the other hand, it has with more reason been contended that as the informer is bound when the King is joined with him, much more should he be bound when he sues by himself."—Secondly, he argued that as the 17th section of "The Commissioners Clauses Act, 1847," requires one third of the Commissioners to go out of office by rotation on a certain day in every year, the defendant could not have continued to be a Commissioner for more than three years without re-election: that the declaration only alleged one act by which the defendant became disqualified; and that the learned Judge misdirected the jury in not requiring them to find the date when the defendant first ceased by disqualification to be a Commissioner, and the respective dates when, being disqualified, he acted as a Commissioner; for if he was re-elected after his disqualification he would commit no offence within the statute by then acting as a Commissioner.

POLLOCK, C. B.—With respect to the question upon the statute 31 Eliz. c. 5, it appears to me that no person acquainted with the history of the law of England would entertain any doubt that a penal action by a common informer must be brought within one year after the commission of the offence. It is assumed that the question turns entirely upon the 31 Eliz. c. 5, and perhaps, strictly speaking, that is so; but, to come to the conclusion that the plaintiff is entitled to recover four penalties, we must sup-

pose that the legislature, who, by the 7 Hen. 8, c. 3, strictly limited actions by common informers to one year, and by the 18 Eliz. c. 5 took especial care that the process in penal actions should be indorsed with the day, month and year when it issued (the object of both statutes being to suppress vexatious actions by common informers), should by the 31 Eliz. c. 5, when the 7 Hen. 8, c. 3 was repealed and the 18 Eliz. c. 5 unrepealed, have committed the extraordinary blunder that, while they limited the Queen to two years instead of four and the qui tam informer to one year, they allowed the informer pro se ipso an unlimited time to bring his action. Such is the conclusion to which we are invited to come by the argument for the plaintiff.

I am of opinion that the latter part of the 5th section of the 31 Eliz. c. 5 was meant to include not only qui tam actions, but also actions where the penalty is given to a common informer alone. To limit actions where the penalty is given to the Queen alone to two years, and qui tam actions by a common informer to one year, and to impose no limitation whatever where the penalty is given to a common informer alone, would be to come to a conclusion so absurd, and to impute to the legislature such carelessness, that we ought not to put that construction on the statute, more especially after the universal understanding of the profession as to the law on this subject, to my knowledge for more than fifty years, and Mr. Tidd's experience extended far beyond that. The cases cited in favour of the plaintiff's view are so questionable, and are reported in such different ways, that they can scarcely be considered authorities. If the case of *Lookup* v. *Sir T. Frederick* be read as explained by Mr. *Gray*, viz., that the declaration contained two counts, and that the special case mentioned in Buller's Nisi Prius has reference to the first count, there

1866.
DYER v. BEST.

is an express decision of the Court of Common Pleas in support of the construction which we now put upon the statute. I also find that there is a case of *Barrett* v. *Johnson* (*a*) in the Irish Court of Exchequer, which was an action by a common informer upon a penal statute, which gave one moiety of the penalty to the informer and the other to the house of correction where the offence was committed. That case is not an express decision on this point, but the authorities cited before us were there cited, and the statute 7 Hen. 8, c. 3, was referred to; and the Court expressed a strong opinion that the 31 Eliz. c. 5 extended to every species of penal action. In addition, there is the opinion of Chief Baron *Comyn*, Mr. Justice *Buller*, and the learned editor of Saunders's Reports, and greater authorities, so far as names are concerned, cannot be cited. Looking at the statute itself with the reverence due to the legislature, we must not attribute to it the carelessness which some of the older cases would seem to impute, if indeed they are correctly reported. They omit all mention of the statute 7 Hen. 8, c. 3, which seems to me to reconcile the whole code of legislation. In my opinion we should be doing great injustice if we did not hold that the statute 31 Eliz. c. 5 applies to this case, and that, where the penalty is given to a common informer alone, as well as where he sues qui tam, he is bound to bring his action within twelve months after the offence.

I therefore think that, if the action is well founded, and the verdict is to stand, the plaintiff can only recover one penalty.

But I am of opinion that there ought to be a new trial on the ground that there has been a miscarriage of justice.

(*a*) 2 Jones' (Ir. Ex.) Rep. 197.

An action on a penal statute is like the imputation of a crime, and unless the legislature expressly directs that certain proof shall be sufficient, and that it shall be incumbent on the defendant to rebut the imputation, the plaintiff must not merely give evidence of those circumstances which, if true, would render the defendant liable to the penalty, but he must establish, with reasonable certainty, that the defendant has incurred the penalty. I think that has not been done in this case. I need not say more respecting the objection, for it has been sufficiently adverted to in the course of the argument. Indeed, it is not desirable, when a new trial is granted, for the Court to point out in what way the action may be successful, and I should be sorry to do so in the present case.

MARTIN, B.—I am of the same opinion. With respect to the point, whether the 31 Eliz. c. 5 has imposed the limitation of one year on actions where the penalty is given to the informer alone, I entertain no doubt. It is a matter of history that actions of this kind prevailed to a great extent in the reign of Hen. 7, and it is an opprobrium on his memory that he encouraged informers to bring such actions. At that time there were three species of penal actions; first, where the King alone could sue for the penalty; secondly, where the penalty was given to any person who would sue as well for the King as for himself, and, thirdly, where the penalty was given to a common informer alone. Mr. *Matthews* has stated that he has been unable to find any statute prior to the 31 Eliz. c. 5 which gave the penalty to the informer alone. But the 7 Hen. 8, c. 3, conclusively shews that at that time there were three species of penal actions, and it prescribed the periods of limitation within which each should be brought.

1866.
DYER v. BEST.

Thus matters stood until the 31st year of the reign of Queen Elizabeth, when a further step was taken to discourage these actions. The 31 Eliz. c. 5 by a not unreasonable construction may be taken to comprise the three species of penal actions comprised in the 7 Hen. 8, c. 3. It would be monstrous to hold that, a limitation having been placed upon actions by the Crown and actions by a person who sues as well for the Crown as for himself, there is no limitation whatever to actions where the penalty is given to a common informer alone. If we had to decide upon the mere statutes of Henry the Eighth and Elizabeth, I should consider this construction the right construction; but the question is concluded by the judgment of the Court of Common Pleas in the case of *Lookup* v. *Frederick*, where, as stated by Mr. Justice *Buller* (*a*), it was decided that the 31 Eliz. c. 5 extends to all penal actions. Mr. Tidd, in his book of practice (*b*), relies upon it as an authority to that effect, and considers that the construction supposed to have been put upon the Act in *Culliford* v. *Blandford* is unreasonable. Therefore, in my opinion no real doubt can exist that the 31 Eliz. c. 5 prescribes one year as the period within which an action must be brought where the penalty is given to a common informer alone.

With respect to the other point I think that the plaintiff ought to be nonsuited. This action was commenced on the 24th February, 1865, and the jury have found that on one occasion only the defendant acted as a Commissioner within the year before action brought. It may be that he went out of office in 1864, and was re-elected; and in my opinion the onus was on the plaintiff to shew that he did not.

(*a*) Buller's N. P. 195. (*b*) Vol. 1, p. 14.

PIGOTT, B.—I am of the same opinion. I agree with the Lord Chief Baron and my brother *Martin* as to the construction of the 31 Eliz. c. 5; and if anything were wanting to shew that such is the true construction it would be found in the 21 Jac. 1, c. 4, s. 3, which, without distinguishing between a qui tam action and an action by a common informer, requires the informer to make an affidavit that the offence was committed within a year before the information or suit.

With respect to the other point, I agree that there ought to be a new trial.

CHANNELL, B.—I agree with the rest of the Court that, if the plaintiff is entitled to a verdict, it must be in respect of a penalty incurred by the defendant within one year before this action was brought.

With regard to the other point, I am disposed to think that the verdict ought to stand for one penalty; but as the other members of the Court are of a different opinion I think there ought to be a new trial.

Rule absolute for a new trial.

1866.

Jan. 31.

ALEXANDER and Another *v.* JONES.

A defendant who, "at the time of the action brought," has no permanent residence, "dwells," within the meaning of the 9 & 10 Vict. c. 95, ss. 60, 128, at the place of his temporary residence.

H. T. COLE had obtained a rule calling on the defendant to shew cause why the plaintiffs should not recover their costs, and why the Master should not tax the same.

From the affidavits filed in support of and in opposition to the rule the following facts appeared:—The action was on the money counts: claim 50*l.* The defendant paid 15*l.* 7*s.* 6*d.* into Court, which the plaintiffs took out, entering a nolle prosequi for the residue.

The cause of action arose at Clevedon, within the jurisdiction of the County Court of Gloucestershire, holden at Bristol. At the time of action brought (Nov. 29th, 1864,) the plaintiffs dwelt and carried on business at Bristol within the jurisdiction of the said County Court.

The defendant, for three years prior to the 10th of October, 1864, had dwelt and carried on business at the Royal Hotel, Clevedon, but on the 10th October, 1864, he left Clevedon, having disposed of his business. From the 10th to the 21st of October, 1864, the defendant stayed at an hotel in Bristol. On the 21st of October, 1864, he went thence on a visit to his brother-in-law at Garthbeibio Rectory, within the jurisdiction of the County Court of Montgomeryshire, holden at Llanfyllin, and remained there as his brother-in-law's guest until the 6th of December, 1864. On the 29th of November, 1864, the writ in this action issued, and on the 6th of December it was served on the defendant at Garthbeibio, when, as he deposed,

"he was returning to Bristol, where he intended staying some weeks." The distance between Bristol and Garthbeibio exceeds twenty miles.

H. Matthews shewed cause (Jan. 30th) (*a*).—The 15 & 16 Vict. c. 54, s. 4, imposes on the plaintiffs the onus of satisfying the Court that, under the 9 & 10 Vict. c. 95, s. 128, they have concurrent jurisdiction. The Court will not be satisfied of it on these affidavits. The plaintiffs must make out that a temporary residence as a guest will constitute a "dwelling" within the meaning of the 9 & 10 Vict. c. 95, s. 128. That view is opposed to authority as well as to principle. In *Macdougall* v. *Paterson* (*b*) the Court held that one who had a lodging for a temporary purpose did not dwell there in the sense of the statute. [*Channell*, B.—There the party who had the lodging had a permanent residence as well, but this defendant had given up his permanent residence when the writ issued.] The defendant swears that he was returning to Bristol when he was served with the writ.—He also referred to *Bailey* v. *Bryant* (*c*), *Butler* v. *Ablewhite* (*d*) and *Pigrim* v. *Knatchbull* (*e*), as shewing that the Courts of Queen's Bench and Common Pleas were in conflict upon the question of concurrent jurisdiction in cases of double residence.

L. Smith, in support of the rule.—The 9 & 10 Vict. c. 95, s. 128 (*f*), provides several alternatives, and it is

(*a*) Before *Pollock*, C. B., *Martin*, B., *Channell*, B., and *Pigott*, B.
(*b*) 11 C. B. 755.
(*c*) 1 E. & E. 340.
(*d*) 6 C. B. N. S. 740.
(*e*) 18 C. B. N. S. 798.
(*f*) The 9 & 10 Vict. c. 95, s. 128, enacts: "That all actions and proceedings which, before the passing of this Act, might have been brought in any of Her Majesty's Superior Courts of Record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some mate-

1866.
ALEXANDER v. JONES.

sufficient for the plaintiffs if they can bring the case within any one of them. The first alternative is satisfied if, at the time of action brought, the defendant dwelt at Garthbeibio, since that is more than twenty miles from where the plaintiffs dwelt. The second is satisfied if, at the time of action brought, the defendant did not dwell within the jurisdiction of the County Court of Gloucestershire, since there the cause of action arose. Now, at the time of action brought, the defendant had quitted his permanent residence without the intention of returning to it; and consequently, for the purposes of this Act, must either be taken to have been "dwelling" at his temporary residence at Garthbeibio, or to have been at that time without a residence. Whichever construction be adopted, this case is within the Act. If the first, the defendant was dwelling more than twenty miles from the plaintiffs; if the second, he was not resident within the jurisdiction of the County Court where the cause of action arose. The first, however, is submitted to be the more reasonable construction, viz., that one who has no permanent residence "dwells," within the meaning of the 60th and 128th sections, where he temporarily abides. For otherwise it would follow from the 60th section that no one so situated could be sued in a County Court without leave to sue being first obtained.—He referred to Chitty's Archbold's Practice, p. 482, 11th ed., and *Rolfe* v. *Learmonth* (*a*).

Cur. adv. vult.

MARTIN, B., now said.—This case stood over that we might

rial point within the jurisdiction of the Court within which the defendant dwells or carries on his business *at the time of the action brought*, . . . may be brought and determined in any such superior Court, at the election of the party suing or proceeding, as if this Act had not been passed."

(*a*) 14 Q. B. 196.

confer with some of the Judges of the other Courts. We are of opinion that the plaintiffs are entitled to costs. The defendant had resided, before this action was brought, at Clevedon, a place within the jurisdiction of the County Court of Gloucestershire, holden at Bristol; but at the time when the action was brought he had left Clevedon without intending to return to it. He had gone on a visit to his brother-in-law, who resided within the jurisdiction of the County Court of Montgomeryshire, and was there staying, not as a permanent resident, but as his brother-in-law's guest, when the writ in this action issued, and was served upon him.

The question is, are the plaintiffs entitled to costs? We think they are. The 9 & 10 Vict. c. 95, s. 60, enacts that a "summons may issue in any district in which the defendant, or one of the defendants, shall dwell or carry on his business at the time of the action brought;" and though it also provides for the summons issuing in certain other districts, that can only be done by leave of the Courts of such districts. Therefore, unless that leave be given, the jurisdiction of the County Court is regulated by the place where "the defendant dwells or carries on his business at the time of the action brought;" and the same words are again used in the 128th section, in dealing with the question of concurrent jurisdiction. Now this defendant, "at the time of the action brought," had no dwelling place in the ordinary acceptation of the term, and therefore, unless we hold that at that time his brother's house was his dwelling place, no action at all could have been brought against him in any County Court without obtaining special leave. We think that, for the purposes of this Act, a man who has no fixed or permanent residence must be taken to dwell at the place where he is living and

1866.
ALEXANDER
v.
JONES.

abiding, even though he be there merely as a guest upo
a visit, although it might not be so if at the time he had
permanent residence. The plaintiffs have therefore brough
this case within the 128th section, and are entitled t
costs.

Rule absolute.

HILARY VACATION, 29 VICT.

1866.

WRIGHT v. DELEY and Others.

Feb. 9.

A rule of a benefit building Society, enrolled under the 6 & 7 Wm. 4, c. 32, provided "that any member who should be desirous of withdrawing from the Society any share or shares should be allowed to do so on giving two months' notice in writing of such his or her intention to the secretary, subject to the payment of all fines then due, and to a certain deduction as a proportionate share of expenses incurred. Provided always, that the deduction should not extend to widows and children of deceased members, who should always have a priority in cases of withdrawal." Another rule provided "that the board of management for the time being should determine all disputes which might arise respecting the construction of the rules, or of any of the clauses, matters or things therein contained; and also of any additions, alterations, or amendments which should or might thereafter arise between the board and any member of the Society; and in the event of their decision being unsatisfactory, then to be referred to arbitration." The plaintiff, a member of the Society, gave notice of his intention to withdraw, and claimed the amount of his shares. The board refused to pay it, on the ground that previously to the plaintiff's notice other members had given notice of withdrawal, and were therefore entitled to priority of payment, and that the Society had no funds to pay the plaintiff's claim. The plaintiff thereupon brought the present action.—*Held*, that the plaintiff's claim was a dispute between the board and a member of the Society respecting the construction of a rule, and therefore the action was not maintainable, but the dispute must be determined by the board or arbitrators.

DECLARATION.—For that whereas the defendants are trustees of the Third Poplar and Limehouse Benefit Building Society, appointed under and by virtue of certain rules enrolled pursuant to the act of parliament of 6 & 7 Wm. 4, c. 32, and as such trustees are by virtue of the said rules and the statutes in that behalf possessed of all the monies and other property of the said Society, and are entitled to sue and be sued on behalf of the said Society. And whereas, by one of the said rules (*a*) it is provided: "That any member who shall be desirous of withdrawing from this Society any share or shares shall be allowed to do so on giving two months' notice in writing, according to Form 2 at the end hereof of such his or her intention to the secretary, subject to the payment of all fines then due, and to the deduction of *5s.* per share during the first five years

(*a*) Rule 18.

1866.
WRIGHT v. DEELEY.

of the Society, and 2*s.* 6*d.* per share for the next five years, as a proportionate share of the expenses incurred (*a*). And the plaintiff became a member of the said Society upon the terms aforesaid, and paid certain subscriptions in respect of certain shares held by him in the said Society, amounting to a large sum (to wit) 100*l.*; and after such payment, and before the committing of the grievances hereinafter mentioned, the plaintiff gave to the secretary two months' notice in writing, according to the said form in the said rules mentioned, of his intention of withdrawing from the said Society; and all things had happened and conditions performed, and all times had elapsed to entitle the plaintiff to withdraw from the said Society, and to have the amount of his said shares, subject to the deductions aforesaid, repaid to him by the said trustees: Yet the plaintiff has not been allowed to withdraw from the said Society, and hath not been repaid the amount of his said shares, nor any part thereof, either by the defendants, as such trustees as aforesaid, or by the said Society.

Plea.—That the said Society was, before the accruing of the supposed causes of action, and still is, a benefit building Society, duly established under and according to the act of parliament, &c. (6 & 7 Wm. 4, c. 32), and by the rules of the said Society before then duly made, certified and enrolled, it was and is provided as follows (*b*):—"That the board of management for the time being, or the major part of them, shall determine all disputes which may arise respecting the construction of these rules, or of any of the clauses, matters or things herein contained; and also of any additions, alterations or amendments which shall or

(*a*) This rule concludes thus:—"Provided always, that the deduction hereinbefore mentioned shall not extend to widows and children of deceased members, and who shall always have a priority in cases of withdrawal."

(*b*) Rule 14.

may hereafter arise between the board and any member of this Society, or persons claiming on account of a member; and in the event of their decision being unsatisfactory, then to be referred to arbitration as set forth in the next rule" (a). "That at the first appropriation meeting of the members after the enrolment of these rules, five arbitrators shall be elected, none of the said arbitrators being beneficially interested, either directly or indirectly, in the funds of the Society; and in each case of dispute referred to them, the names of the arbitrators shall be written on pieces of paper and placed in a box or glass, and the three whose names are first drawn by the complaining party, or some one appointed by him, her or them, shall be the arbitrators to decide the matter in dispute, and their decision shall be final and binding on all parties; and each of the three arbitrators shall receive 6*s.* 8*d.* remuneration. The party requiring the arbitration shall deposit with the secretary the sum of 20*s.*, and the costs of the reference shall be paid by the Society, or by such party demanding the same, as the arbitrators direct." And that the plaintiff became and was a member of the said Society, and as such member subject to the said rules, and that the present claim is a dispute between the board of management of the said Society and the plaintiff, as such member, respecting certain matters and things contained in the said rules, and which, by the said rules, and the statutes in such case made, ought to be decided by the said board of management, subject to an appeal to arbitration as therein mentioned. And that the defendants and the said Society have done all things necessary on their parts respectively, and all necessary conditions have been performed to entitle them to have the said dispute so decided, but the plaintiff has neglected and refused

(a) Rule 15.

1866.
WRIGHT v. DEELEY.

to submit the said dispute to the decision of the said boa of management.

The plaintiff took issue on, and also demurred to tl plea.

The cause came on for trial at the last Surrey Summ Assizes, when a verdict was taken for the plaintiff for 63 subject to a special case (so far as material) as follows:—

The plaintiff is a tradesman in Poplar, in the county Middlesex, and the defendants are the trustees of tl Third Poplar and Limehouse Benefit Building Societ which was established in November, 1863, under the 6 & Wm. 4, c. 32.

The rules and regulations for the government of tl Society were duly made by the members thereof, and (the 12th of the said month duly certified and enroll pursuant to the statutes in that behalf, and are to be tak as part of this case.

On the 10th of March, 1863, the plaintiff became tl holder of four shares in the Society, and continued tl holder thereof till the 10th of April, 1865. The plaint duly paid to the Society the whole amount of the subscri tions and fines and other monies which became and we due and payable from time to time in respect of the sa shares up to the 10th of April, 1865. The total amou so paid by him is 63*l.* 15*s.* 2*d.*, and, after allowing for a deductions for which he is liable, such subscriptions amou to 62*l.*, and that amount it is admitted is now due to hi in respect of such subscriptions, if he is entitled to recov in this action.

On the 10th of April, 1865, the plaintiff duly gave th secretary notice that he was desirous of withdrawing h subscriptions on his shares from the funds of the ass ciation.

The plaintiff's name, as member of the Society, w

thereupon erased and removed from the register of members and other books of the Society, and he thereupon ceased to act as a member thereof.

At different times between the 1st of November, 1864, and the 9th day of April, 1865, twenty-five members of the Society gave to the secretary two months' notice in writing of their intention to withdraw from the Society their respective shares and subscriptions, which subscriptions, after making all deductions to be made in that behalf under the said rules, amounted to 594*l.* 15*s.* Before the 10th of June, 1865, eight of the twenty-five members who first gave the notice were paid the amount of their respective subscriptions, 233*l.* These eight members were paid in rotation, according to the time when they gave their notices. On the 20th of June, 1865, another of the said twenty-five members (he having given his notice prior to the other notices given by the members who had not been paid) was paid his subscriptions, amounting to 41*l.* 5*s.* Except as aforesaid, at the commencement of this action no part of the said sum of 594*l.* 15*s.* was paid.

Under the 12th of the said rules, on the 21st of December, 1864, the sum of 200*l.* was duly appropriated and awarded by the then directors of the Society to Mr. Deeley, then and continually since a member of the Society. On the 24th of February, 1865, the further sum of 200*l.* was duly appropriated and awarded by the then directors of the Society to Mr. Wood, then and continually since a member of the Society.

The said persons to whom the said appropriations were made were, continually after the making of the same, entitled to have the same paid to them in accordance with the rules of the Society, subject to the question whether the plaintiff was not first entitled to have paid to him the

1866.
WRIGHT v. DEELEY.

money sought to be recovered in this action. The said monies, however, were actually payable to the said members at the time this action was brought, but no particular sums of money were specifically set apart for such payments.

The sum of 200*l.* appropriated to Mr. Deeley has been, ever since the appropriation, at the Society's bankers ready to be paid by the Society to him. The sum of 200*l.* appropriated to Mr. Wood was duly paid by the Society under such appropriation on the 10th of October, 1865.

At the time of the commencement of this action the Society had at their bankers the sum of 254*l.* 18*s.* 10*d.*, which includes the 200*l.* appropriated to Mr. Deeley as aforesaid.

The matters in dispute in this action have not been referred to arbitration under the 15th rule (*a*). The defendants and the board of management have always been ready and willing to submit them to arbitration. The Society called the plaintiff's attention to the 15th rule on the 24th June, 1865. This action was commenced on the 26th of June, 1865, and at that time arbitrators had been appointed. The plaintiff, before action, applied to the Society for the amount of his claim, but they refused to pay the same upon the alleged ground that they had, under the circumstances, no money in hand applicable to the payment of such claim (*b*).

J. Brown (*Digby* with him), for the plaintiff.—This action is maintainable. This Society is established under

(*a*) *Ante*, p. 211.

(*b*) The Court, being satisfied that the defendants were entitled to judgment on the plea, gave no judgment upon the special case, and therefore the questions for their opinion are omitted.

the 6 & 7 Wm. 4, c. 32, intituled "An Act for the regulation of Benefit Building Societies." Section 4 incorporates all the provisions of the Friendly Societies Act, 10 Geo. 4, c. 56, and certain provisions of the 4 & 5 Wm. 4, c. 40. By the 8th section of the 10 Geo. 4, c. 56, all rules for the management of the Society, when confirmed by justices, shall be binding on the members and officers of the Society. Section 27 requires that provision be made by one or more rules, specifying whether a reference of every matter in dispute between the Society and any member thereof shall be made to justices or arbitrators. By the 14th rule (*a*) of this Society the board of management (who are defined by rule 3 (*b*) "shall determine all disputes which may arise respecting the construction of these rules, or of any of the clauses, matters, or things herein contained; and also of any additions, alterations or amendments which shall or may hereafter arise between the board and any member of this Society, or persons claiming on account of a member." First, the plaintiff's claim in this action is not a dispute within the terms of that rule. It is not a dispute respecting the construction of the rules, or of any clauses, matters or things therein contained; but the plaintiff, having withdrawn from this Society, demands payment of the amount of his shares, and the board of management reply that other members who have previously withdrawn have a right to priority of payment. In *Cutbill* v. *Kingdom* (*c*) a rule of a benefit building Society provided that a committee should determine all disputes which might arise respecting

(*a*) *Ante*, p. 210.

(*b*) Rule 3.—"Board of Management, &c.—That the business of this Society shall be conducted and managed by three trustees, seven directors and a treasurer, all of which offices shall be honorary, and be filled by members of the Society."

(*c*) 1 Exch. 494.

1866.
WRIGHT v. DEELEY.

the construction of the rules of the Society, or any of the clauses, matters, or things therein contained, and also of any additions, alterations or amendments which should or might thereafter arise between the trustees, officers, and other members of the said Society; and this Court held that the trustees were not precluded from suing a member for the amount of his subscriptions and fines. [*Channell*, B.—The substance of that decision is that an agreement to refer does not oust the jurisdiction of the superior Courts where there is an express covenant by another instrument.] The plaintiff's claim is not a dispute between the board and a member of the Society, for the plaintiff ceased to be a member before the dispute arose. In *Morrison* v. *Glover* (*a*) it was held that as some part of the plaintiff's claim was not a matter in dispute between the Society and the defendant as member, but only as mortgagor, the Society was not bound by its rule to refer to arbitration the subject-matter of the action. *Farmer* v. *Giles* (*b*) is an authority to the same effect. A claim by an administrator on a policy of life assurance granted to the intestate by a friendly Society is not within the rule which requires disputes between the Society and a member, or a person claiming on account of a member, to be referred to arbitration: *Kelsall* v. *Tyler* (*c*). Secondly, assuming that the plaintiff's claim is a dispute within the terms of the rule, the plaintiff is not bound by it, because it does not comply with the requisitions of the 27th section of the 10 Geo. 4, c. 56. That section requires matters in dispute to be referred to justices or arbitrators, but the 14th rule refers them to the board of management or arbitrators.

(*a*) 4 Exch. 430. (*b*) 5 H. & N. 753.
(*c*) 11 Exch. 513.

Eyre Lloyd appeared for the defendant, but was not called upon to argue.—He referred to *Farmer* v. *Smith* (*a*).

MARTIN, B.—I am of opinion that the defendants are entitled to judgment.

The declaration states that the defendants are trustees of a building Society, under certain rules enrolled pursuant to the 6 & 7 Wm. 4, c. 32. The statute recites that "certain Societies, commonly called building Societies, have been established in different parts of the kingdom, principally amongst the industrious classes, for the purpose of raising, by small periodical subscriptions, a fund to assist the members thereof in obtaining a small freehold or leasehold property, and it is expedient to afford encouragement and protection to such Societies and the property obtained therewith." The statute then proceeds to enact that any number of persons may form themselves into Societies for the purpose of raising, by subscriptions of the members, shares not exceeding the value of 150*l.* each, a stock or fund for the purpose of enabling each member to receive the amount of his share to erect or purchase one or more dwelling houses. The statute then proceeds, by the 4th section, to incorporate the Friendly Societies Act, 10 Geo. 4, c. 56, and the provisions of the 4 & 5 Wm. 4, c. 40, as to enrolment of rules. The rules of this Society form part of the case. There is nothing in them at variance with the provisions of these Acts, or the general law of the realm, and, in addition, they have been certified by the barrister appointed to certify the rules of these Societies. Therefore I apprehend these rules are binding on every member of the Society. The declaration proceeds to state

(*a*) 4 H. & N. 196.

1866.
WRIGHT v. DEELEY.

that the defendants, as such trustees, are possessed of the monies and property of the Society; it then sets out the 18th rule, and avers that the plaintiff became a member of the Society, and paid a sum of money for subscriptions in respect of shares; that he gave notice of his intention to withdraw from the Society, and that all things happened and conditions were performed, and times elapsed, to entitle him to withdraw from the Society and have the amount of his shares, subject to certain deductions, yet he has not been allowed to withdraw from the said Society, and hath not been paid the amount of his shares.

The first question is, whether any cause of action is shewn on the face of the declaration, and whether it is not bad upon demurrer. I think it is; though it is not necessary to decide that point, for I am clearly of opinion that the plea affords a complete defence to the action. The plea commences with a repetition of the statements in the declaration as to the defendants being a benefit building Society. It then sets out the 14th rule, which provides that the board of management shall determine all disputes which may arise *respecting the construction of the rules, or of any of the clauses, matters or things therein contained,* and in the event of their decision being unsatisfactory, the dispute is to be referred to arbitration in manner provided by the next rule.

The facts are, that the plaintiff gave the defendants notice of his desire to withdraw from the Society, and, this withdrawal being assented to, it is conceded that he is entitled to receive back his subscriptions on shares, subject to certain deductions. But the defendants contend that they have a right to regulate the time when the money is to be paid, and that, as previous notices of withdrawal had been given by other members, they became entitled to

priority of payment. Now, although the 14th rule is not well expressed, it is clear that this claim is a dispute respecting the construction of a rule; and that it was intended that the board of management should determine whether, upon the true construction of the 18th rule, the plaintiff is entitled to receive the money and the defendants are bound to pay it; or whether, on the other hand, the defendants are not at liberty to take into consideration all the circumstances, and defer the payment if other members have a right of priority. Without saying whether the defendants' construction of the 18th rule is right or wrong, I think this claim is a dispute between the board of management and a member of the Society respecting the construction of a rule, and that, in the event of the decision of the board being unsatisfactory, the matter must be referred to arbitration.

The plea proceeds to set out the 15th rule, and avers that the plaintiff is a member of the Society and subject to the rules, and that the present claim is a dispute between the board of management of the Society and the plaintiff, as such member, respecting certain matters and things contained in the said rules, and which, by the rules and the statutes, ought to be decided by the board of management, subject to an appeal to arbitration. In my opinion all those averments are proved. The plea then proceeds to aver that the defendants have done all things necessary, and all conditions have been performed to entitle them to have the dispute so decided, but the plaintiff has refused to submit the dispute to the decision of the board of management. It is clear that the plaintiff has so refused, and therefore, in my judgment, every averment in the plea is proved.

It is argued that the 14th rule is not in compliance with

1866.
WRIGHT v. DEELEY.

the requisitions of the 27th section of the 10 Geo. 4, c. 56, but there is no foundation for that argument. The plaintiff has himself agreed that certain matters in dispute between him and the board of management shall not be the subject of an action in a Court of law, and after the decision of the House of Lords in *Scott* v. *Avory* (*a*) it is clear this action is not maintainable. I have read the judgments of the Lord Chief Justice, and my brothers *Crompton* and *Cresswell* and I concur with them. According to the statement in this case, twenty-five members have given notice of their intention to withdraw from the Society, and if this action could be maintained the Society would be liable to twenty-five actions.

CHANNELL, B.—I am also of opinion that the defendants are entitled to judgment. I doubt whether the declaration is good upon the face of it; but it is not necessary to determine that point, because I am clearly of opinion that all the material parts of the plea are proved.

PIGOTT, B., concurred.

Judgment for the defendants.

(*a*) 5 H. L. 811.

1866.

WILSON *v.* JONES.

Feb. 7.

An electric telegraph Company, being about to lay down an electric cable between Ireland and Newfoundland, a shareholder in the Company effected an insurance in the common form of a marine policy of insurance, with the following words in the margin of the policy; "and to continue until the said cable be laid in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland, and vice versâ; the risk of this policy then to cease and determine: this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable from and including its lading on board the 'Great Eastern' until 100 words be transmitted from Ireland to Newfoundland, and vice versâ; and it is hereby distinctly declared and agreed that the transmission of the said 100 words shall be an essential condition of the policy." The ship sailed from Ireland with cable on board of the length of 2200 miles, and after about 1200 miles of it had been laid down, in consequence of the electric current not acting, some of it was drawn back into the ship, and whilst this was being done a part of the cable which was on board broke, and the broken end fell into the sea. Some fruitless endeavour was made to raise it, but ultimately the ship returned with the remainder of the cable, about 1200 miles in length, on board.—*Held:* First that the insurance was not on the cable, but on the risk and contingency of successfully laying it down.

Secondly, that the plaintiff was entitled to recover for a total loss.

THE declaration stated that the plaintiff, by J. Joyce, his agent, by a policy of insurance, bearing date the 21st of July, 1865, caused himself to be insured in the words and figures following that is to say:—"J. Joyce, as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from Ireland to Newfoundland. The risk to commence at and from and including the lading of the cable on board of the 'Great Eastern' (*a*), *and to continue until the said cable be laid in one continuous length between Ireland and Newfoundland, and until* 100 *words shall have been transmitted from Ireland to Newfoundland, and vice versâ, the risk of this policy then to cease and determine.* Upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship,

(*a*) The clauses in Italics were *written* in the margin of the policy, which was in the ordinary *printed* form.

1866.
WILSON v. JONES.

or vessel called the 'Great Eastern' whereof is master for this present voyage ———, or whosoever else should go for master in the said ship, &c., beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above, upon the said ship, &c., including risk of craft, and shall so continue and endure during her abode there upon the said ship, &c., and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever shall be arrived, &c., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises until the same be there discharged and safely landed; and it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance. The said ship, &c., goods and merchandizes, &c., for so much as concerns the assured, by agreement between assured and assurers in this policy, are and shall be valued at 200*l.*, on the Atlantic cable value, say on twenty shares valued at 10*l.* per share. *It is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable from and including its lading on board the 'Great Eastern' until* 100 *words be transmitted from Ireland to Newfoundland, and vice versâ; and it is distinctly declared and agreed that the transmission of the said* 100 *words from Ireland to Newfoundland, and vice versâ, shall be an essential condition of the policy.* Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are of the seas, men of war, &c., and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods, merchandises, &c., or any part thereof."—(Then followed the usual

sue and labour clause, and the clause as to the force and effect of the policy.) And so we, the assurers, are contented and do hereby promise and bind ourselves, each for his own part, our heirs, &c., to the assured, their executors, &c., for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured at and after the rate of twenty-five guineas per cent. In witness, &c., W. B. Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under 5*l.* per cent.; and all other goods, also the ship and freight, are warranted free from average under 3*l.* per cent., unless general or the ship be stranded.—Averments: that the defendant, for a certain premium paid to him by the plaintiff, subscribed the said policy for 200*l.*, and became an insurer thereon to the plaintiff to that amount on the said Atlantic cable and premises, and the said Atlantic cable was shipped on the said ship to be carried thereon, and to be laid in one continuous length between Ireland and Newfoundland. And the plaintiff was then, and thence until and at the time of the loss hereinafter mentioned, interested in the said cable to the amount of all the monies by him insured thereon. And the said ship, with the said cable on board thereof, sailed on the said voyage, and afterwards, and whilst the said ship, with the said Atlantic cable on board thereof, was proceeding on the said voyage, and during the continuance of the said risk, and before the said Atlantic cable was laid in one continuous length between Ireland and Newfoundland, and before 100 words had been transmitted from Ireland to Newfoundland and vice versâ, the said Atlantic cable was, by perils so insured against as aforesaid, wholly lost; and all conditions were

1866.
WILSON v. JONES.

fulfilled, &c., to entitle the plaintiff to be paid the said 200*l.*—Breach: nonpayment.

Pleas (inter alia).—Thirdly: that the said cable was not lost by the perils insured against, or any of them, as alleged.

Fourthly: that the alleged loss of the said cable was an average loss under 3*l.* per centum within the meaning of the said policy, and was not a general average loss, and the said ship, during the said voyage, was not stranded.—Issues thereon.

At the trial, before *Martin*, B., at the Liverpool Winter Assizes, 1865, the following facts appeared (*a*).—The plaintiff was the owner of twenty shares in the 8*l.* per cent stock of the Atlantic Telegraph Company. The defendant was an underwriter at Liverpool. The policy set out in the declaration was underwritten by the defendant on the 29th July, 1865, for 200*l.* at a premium of twenty-five guineas per cent. On the 23rd July, 1865, the "Great Eastern" left Valentia, in Ireland, for Newfoundland, with 2200 miles of the Atlantic telegraph cable on board. The contractors for laying down the cable were the Telegraph Construction and Maintenance Company. On the morning of the 2nd August, when from 1100 to 1200 miles of the cable had been laid down, it was discovered that the electric current did not pass. A portion of the cable was then hauled back into the ship; and while this was being done the cable parted on board ship inside the bows, and the broken end fell into the sea. The weather which prevailed at and about the time of the parting of the cable was described in the ship's log and proved in evidence to have been as follows:—"Light westerly airs and fine clear

(*a*) The facts here stated are those agreed upon by counsel on appeal to the Exchequer Chamber.

weather." Attempts were made to recover the lost end of the cable. It was twice hooked by means of grapnels let down from the "Great Eastern," but the grapnel lines broke whilst being hauled up. With grapnel lines of sufficient strength it is probable that the detached part of the cable may be recovered. There would have been no difficulty in splicing the cable on board if the lost end had been recovered. This was in fact done in the early part of the voyage; the cable having parted about fifteen miles from Valentia, the lost end was recovered and united to the broken end on board the "Great Eastern." The "Great Eastern" ultimately returned to Sheerness with the remainder of the cable, which is about 1200 miles in length. A prospectus issued by the Atlantic Telegraph Company after the return of the "Great Eastern" contains the following paragraph:—"The contractors also undertake, during 1866, without any further charge whatever, to go to sea with sufficient cable, including that now left on board the "Great Eastern," and all proper appliances and apparatus such as experience has shewn to be necessary, and to use their best endeavours, in the success of which they express entire belief, to recover, repair and complete in working order between Ireland and Newfoundland the present broken cable, which has been ascertained, by recent careful electrical tests, to be in perfect order throughout its entire length."

It was submitted, on behalf of the defendant, at the close of the plaintiff's case, first, that there was no evidence of a loss by the perils insured against; and, secondly, that the loss (if any) was an average loss, and there was no evidence that it was greater than 3*l.* per cent.

The learned Judge ruled that the plaintiff was entitled to recover for a total loss, and directed the jury accordingly to find their verdict for the plaintiff for 200*l.*, reserving

1866.
WILSON v. JONES.

leave to the defendant to move to enter the verdict for him, or to reduce the damages if the loss was only an average loss, the Court to say on what principle that average should be calculated, and with power to draw all inferences of fact, if necessary.

Brett, in Hilary Term, obtained a rule nisi to enter the verdict for the defendants, on the grounds that the loss was not any loss by the perils insured against, or, if any, only an average loss, and no evidence that it was higher than 3*l.* per cent.; or to reduce the damages, on the ground that, if any loss, it was only an average loss; against which

Temple and *Leofric Temple* shewed cause (*a*).—First, the loss was a loss by the perils insured against. In addition to the ordinary perils and casualties this policy provides for every risk and contingency attending the conveyance and successful laying of the cable, from and including its lading on board the "Great Eastern" until 100 words are transmitted from Ireland to Newfoundland. That must mean perils different from those of the seas, otherwise the provision would be useless.—Secondly, there was a total loss. The policy is a contract to indemnify against the failure of the undertaking. In that respect this case is distinguishable from *Paterson* v. *Harris* (*b*), which was an insurance upon the cable. [*Pollock*, C. B.—Is no allowance to be made for the 1200 miles of cable saved?] The undertaking has totally failed, and if an attempt be made to lay down the cable saved that will be a new adventure.

Brett and *Quain*, in support of the rule.—First, the loss was not a loss by perils of the seas. This policy is in the

(*a*) Jan. 31. Before *Pollock*, C. B., *Martin*, B., *Channell*, B., and *Pigott*, B.

(*b*) 1 B. & S. 336.

ordinary form of a marine policy of insurance, and should receive the construction put upon such documents. If it is not a marine policy, it is a wager. [*Pigott*, B.—The form is applicable, because if the ship had sunk with the cable on board there would have been a total loss.] The insurance is on the cable, not upon the shares: and it is a valued policy, the value being twenty shares of 10*l.* each, amounting to 200*l.* If that be an insurance upon the shares, there is no insurable interest within the definition of *Lawrence*, J., in *Lucena* v. *Craufurd* (*a*); for the shares were never at risk by perils of the seas: Arnould on Insurance, p. 49, 3rd ed. [*Martin*, B.—The 19 Geo. 2, c. 37, only requires that the policy shall not be a gaming one: 2 Wms. Saund. 203, note 17.] If it had been intended to insure the shares, the language would have been "on the Atlantic cable, that is to say, on twenty shares in the adventure." The policy would not have attached unless the cable had been put on board the ship. *Paterson* v. *Harris* (*b*) is an authority that this is a contract to indemnify the owner of the shares against any loss to his interest in the cable. The only difference between the language of that policy and this arises from the words inserted in the margin. But those words do not alter the subject-matter of the insurance, but only define the continuation of the risk. It is, in effect, a stipulation that the risk of the policy shall continue, not only until the cable is laid, but until it is successfully laid, and 100 words transmitted by it. But, even supposing it to be an insurance on the shares, it is only a guarantee that the shares shall not be deteriorated or destroyed by injury to the cable; and then it becomes necessary to shew that the injury was caused by some of the perils insured against. In the body of the policy the perils insured

(*a*) 2 Bos. & P. N. R. 269. 302. (*b*) 1 B. & S. 336.

1866.
WILSON v. JONES.

against are the ordinary "perils of the seas;" and in addition there is inserted in the margin the words "every risk and contingency attending the conveyance and successful laying of the cable." But those words must be read as if they were in the body of the policy, and as meaning risks *ejusdem generis*, so that, in addition to the ordinary perils of the seas, the policy covers every other risk and contingency *caused by the seas*. A loss arising from an inherent defect in the cable itself is not within the terms of such a policy. [*Pigott*, B.—Is it a contingency attending the laying the cable?] The loss must be occasioned by a peril in the nature of a sea peril.—Secondly, assuming there was a loss by perils of the seas, was it a total or a partial loss? If the insurance is on the cable, there is no doubt it was not a total loss; for only one half of the cable was at the bottom of the sea and the other half was on board the ship and brought back to England. As against the assured it must be taken that he has the power of getting it. [*Martin*, B.—Suppose a cable is only useful because it extends from Dover to Calais, and half of it is broken off, is there not a total loss of the cable? It is not like a loss of some part of a cargo, for what is saved may be sold. The insurance is upon the entire cable, and not as if it were upon each link of a chain.] Assuming the insurance was upon the shares, it was not a total loss, because they are still of some value. If the insurance was not upon the cable or the shares, but upon the success of the undertaking, there is no total loss, for upon another attempt the adventure may be successful.

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B.—This is a rule to enter a nonsuit in a case

tried before me at the last Liverpool Assizes. The verdict was entered for the plaintiff for 200*l.*, being a total loss upon a policy of insurance.

The facts are these. The Atlantic Telegraph Company were about to lay down an electric cable between Ireland and Newfoundland. The cable had been put on board the "Great Eastern" steamship, and it was intended that she should proceed from Ireland to Newfoundland and convey and lay down the cable as she went along. The "Great Eastern" left Valentia, in Ireland, on the 23rd July, with 2200 miles in length of cable on board, and on the 2nd August had laid down from 1100 to 1200 miles of it. Upon that day, in consequence of the electric current not acting, some of the cable was being drawn back into the ship, and whilst this was being done a part of the cable which was on board broke, and the broken end fell into the sea. Some fruitless endeavour was made to raise it, but ultimately the "Great Eastern" returned to Sheerness with the remainder of the cable, about 1200 miles in length, on board, where it now is, and it is hoped by the directors that the part saved may be made available for another attempt. The Atlantic Telegraph Company is a Joint Stock Company, and the plaintiff was the owner of twenty shares of 10*l.* each in it. The defendant underwrote a policy on the 29th July for 200*l.*, and the question is, whether the plaintiff is entitled to recover as for a total loss, or any smaller sum.

The contract between the parties is contained in a paper which was the common printed form of a marine policy. It states that the plaintiff's agent caused himself to be insured at and from Ireland to Newfoundland, the risk to commence at, &c., the lading of the cable on board the "Great Eastern," and to continue until the cable be laid down *in one continuous length between Ireland and Newfoundland*, and until 100 words should have been transmitted from Ireland to Newfoundland, and vice versâ, the risk on

1866.
WILSON v. JONES.

the policy then to cease and determine. The ship was the "Great Eastern." The goods, &c., were valued at 200*l.* on the Atlantic cable, value say on twenty shares, value at 10*l.* per share, and in the margin, opposite the usual clause "Touching the adventure and perils which the assurers were contented to bear and take upon them, &c.," there was written as follows:—"*It is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable from and including its loading on board the 'Great Eastern' until* 100 *words be transmitted from Ireland to Newfoundland and vice versâ, and it is distinctly declared and agreed that the transmission of the said* 100 *words from Ireland to Newfoundland and vice versâ shall be an essential condition of the policy.*" The premium was twenty-five guineas per cent., and the defendant underwrote the policy for 200*l.*

The case has been argued before us. The contract is partly written and partly printed, and the agreement between the parties is to be ascertained by the words of it. The circumstance that it is upon the printed form which is usually adopted for a common marine policy is wholly immaterial if the language used and adopted by the parties shews that the insurance extends further than marine policies ordinarily do. In the present policy the risk of the insurance is declared to commence from the loading of the cable on board, and to continue until it be laid down *in one continuous length* between Ireland and Newfoundland, and until 100 words shall have been transmitted to and fro, when the risk is to cease and determine. Now, so far, the words express that the subject-matter of insurance was the cable, but in the subsequent part of the policy it was declared to be agreed that in addition to the ordinary perils and casualties insured against in the common marine

policy *the insurance is to cover every risk and contingency attending the conveyance and successful laying down of the cable.* It seems to us that words cannot be used more apt and fit to express that the underwriter contracted to insure against the risk and contingency which has happened, viz., the unsuccessful attempt to convey and lay down the cable. It seems to us that what has occurred is within the very words of the contract. It was a risk and contingency which attended the conveyance of the cable and the unsuccessful attempt to lay it down. In truth the policy is not merely on the cable, but on the adventure.

The second question is, whether the loss be total or partial. We think it total. The adventure in respect of which the assurance was effected was the successful laying down of the cable, which was loaded on board the "Great Eastern" in one continuous length between Ireland and Newfoundland. This has wholly failed; and in our opinion the circumstance that one-half of the cable has been saved is immaterial. The assurance was upon the adventure, and even if it had been merely upon the cable it was upon the entire continuous cable, and not a portion of it. There was a case cited, *Paterson* v. *Harris* (*a*), which is supposed to have some bearing upon the point. It really has none whatever. It was an action upon a policy in the common form, and the Court held that what occurred there was not a loss by "perils of the sea." It may possibly be that the loss in the present case is not a loss by "perils of the seas;" but upon this it is unnecessary to give an opinion, as I think the misfortune which has occurred is distinctly and plainly within the words of the policy, and the risk and contingency against which the defendant contracted to insure.

Rule discharged.

(*a*) 1 B. & S. 336.

1866.

Feb. 9.

WILSON *v.* THE NEWPORT DOCK COMPANY.

In an action for a breach of contract in not admitting the plaintiff's ship into the defendants' dock, whereby she grounded when the tide ebbed, and was damaged, it appeared that the ship left in ballast a dry dock where she had been repaired, and, in charge of a pilot, was towed by a steam-tug to the defendants' dock, where she arrived about high water. In consequence of the chain of the dock gate being broken, she could not be admitted. The captain was unacquainted with the navigation, and, considering that the ship was not sufficiently ballasted to go to sea, directed her to be anchored where she was. At the ebb of the tide she grounded and was damaged. There was conflicting evidence as to the state of the weather. The jury were asked, first, whether there was a place of safety to which the ship could have been taken before the tide ebbed; secondly, whose fault was it that she was not taken there? Upon the first question they returned no answer, being unable to agree, but replied to the second that neither the captain nor the pilot were to blame.

Held, per *Martin*, B., that the damages were not too remote to be recovered by the plaintiff.

Per *Pollock*, C. B., *Channell*, B., and *Pigott*, B., that the finding of the jury was not sufficient to enable them to come to a conclusion, and that there must be a new trial.

THE declaration stated that the defendants were the proprietors of a certain dock communicating with a certain tidal river, to wit, the river Usk, which dock was used for the reception and docking of ships and vessels therein, for reward to the defendants in that behalf, and the plaintiff was the owner of a ship or vessel, and was desirous of having the same received and docked in the said dock, for reward to the defendants in that behalf as aforesaid, whereof the defendants had notice; and thereupon, in consideration that the plaintiff would cause the said ship to be brought at a certain time and on a certain day towards and to the said dock for the purpose of being so received and docked therein as aforesaid, the defendants promised him so to receive and dock the said ship therein as aforesaid. And the plaintiff says that he, relying on the defendants' promise, did cause the said ship to be brought at the time and on the day aforesaid towards, and the same was being brought towards and to the said dock for the purpose of being so received and docked therein as aforesaid, and all things were done, &c., to entitle the plaintiff to have had his said ship then so received and docked as aforesaid. Yet the defendants, whilst the said ship was then being so brought towards and to the said dock for the purpose

aforesaid, then wholly refused to and did not nor would then receive and dock the said ship in the said dock; and the said ship being, by reason thereof, left in the said river, at the ebbing of the tide there, grounded and took the ground there, and was thereby greatly damaged and injured, and the plaintiff incurred great expenses in and about having such damage and injury repaired.

Plea.—Payment into Court of 15*l.*

Replication.—That the said sum is not enough to satisfy the claim of the plaintiff.

The cause was tried, before *Byles*, J., at the Monmouthshire Summer Assizes, 1865, when the following facts were proved (as stated in the judgment of *Martin*, B., *post*, p. 239). —On the 17th of November, 1863, the ship "Lord Elgin" was in dry dock at Newport, and upon the morning of that day, by the direction of the dock-master of the defendants' dock, she proceeded towards their dock for the purpose of entering it, being in ballast at the time. It was a very short distance from the dry dock to the defendants' dock, and the ship was towed down the river by a steam-tug, and arrived at the defendants' dock-gate about high water, when, in consequence of the chain of the dock-gate being broken or out of order, she could not be admitted. The captain of the "Lord Elgin" was unacquainted with the river and its navigation, and he directed the ship to be anchored where she was. In about three hours afterwards, upon the ebb, she took the ground and was "hogged," in consequence of which about 2000*l.* had to be expended on her in repairs, and the present question was in respect of this damage. The 15*l.* was paid into Court to cover the expense of bringing the ship down to the dock.

There does not seem to have been any application made to the learned Judge at the conclusion of the plaintiff's case to nonsuit or direct a verdict for the defendants upon

1866.
WILSON v. NEWPORT DOCK CO.

the ground that there was no evidence to go to the jury; and witnesses were called for the defendants.

It was contended that upon the evidence the captain acted improperly; that he ought not to have anchored where he did; that he ought to have done one of several things; that he ought to have gone back towards the dry dock, or have gone down to a place called "West Point," where it was said the ship could have safely grounded, or have gone into deep water and there anchored. The captain stated reasons why, in his opinion, none of these ought to have been done. It was also alleged that the ship was not sufficiently ballasted.

According to the Judge's note, it was contended, on behalf of the defendants, that the damage was too remote, and was unconnected with the cause of action, and upon this point he gave leave to move. He then proposed two questions to the jury: First, whether there was in fact any place of safety to which the vessel might have been taken. Upon this question the jury could not agree: Secondly, whether both the captain and the pilot did the best they could under the circumstances, and whether either of them was guilty of any negligence. To this the jury answered that *they both did the best they could, and that neither of them were guilty of negligence.* Upon this finding the learned Judge directed the verdict to be entered for the plaintiff (the amount of damages having been agreed to be referred), and he gave the defendants leave to move, with power to the Court to draw any inference from the facts consistent with the finding of the jury.

The defendants afterwards obtained a rule to set the verdict aside, on the ground that the sum paid into Court was sufficient to cover the damages legally recoverable; and the damages claimed for injury by the "hogging" of the ship were too remote. The Court to draw inferences

of fact not inconsistent with the finding of the jury; or for a new trial on the grounds of misdirection by the Judge and miscarriage in the finding of the jury.

Huddleston, in the following Michaelmas Term, obtained a rule nisi accordingly; against which

Mellish, *W. H. Cooke* and *Dowdeswell* shewed cause (*a*).—In addition to the sum paid into Court, which is sufficient to cover the expense of bringing the ship to the dock, the plaintiff is entitled to recover the damage caused by her grounding. That damage was the immediate result of the defendants' breach of contract in not admitting the ship into the dock. The case therefore falls within the first branch of the rule laid down in *Hadley* v. *Baxendale* (*b*), which was recognised and adopted in *Smeed* v. *Foord* (*c*). The distinction is between damage which naturally arises from a breach of the contract and mere consequential damage. If the declaration had alleged that, by reason of the injury to the ship, the plaintiff was prevented from fulfilling a charter-party by which he undertook to carry coal from the dock, that would have been consequential damage. [*Pollock*, C. B.—It seems to me a more correct test of liability to inquire whether the defendants' misconduct was the causa causans, or the causa sine qua non. If the causa causans, the damage was the immediate result of the defendants' misconduct, but if the sine qua non the mischief would amount to consequential damage only. It would seem that the mischief was not the immediate result of the act of the defendants in not admitting the ship into the dock; but it arose from that cause, coupled with the course which the plaintiff subsequently took.] The refusal to admit the ship into the dock was not the proximate

(*a*) Jan. 20. Before *Pollock*, C. B., *Martin*, B., *Channell*, B., and *Pigott*, B.

(*b*) 9 Exch. 341.

(*c*) 1 E. & E. 602.

1866.
WILSON v. NEWPORT DOCK CO.

cause of the mischief, but it was the causa causans. The defendants knew the condition of the vessel, and that if she remained outside the dock she would be exposed to risk. In *Gibbs* v. *The Trustees of the Liverpool Docks* (*a*) the defendants were held liable for the damage done to the plaintiff's vessel because, with knowledge of the dangerous condition of the dock, they kept it open and invited the vessel into the peril which they knew it must encounter by continuing to hold out to the public that any ship on payment of the tolls might enter and navigate the dock. In *Collen* v. *Wright* (*b*) the defendant's testator represented that he had authority as agent to let a farm to the plaintiff, when in fact he had no authority, and it was held that the costs of a bill filed by the plaintiff for a specific performance were damages naturally resulting from the misrepresentation. In *Randall* v. *Raper* (*c*) the defendant sold the plaintiff seed barley, warranting it to be of a particular quality, but delivered seed barley of an inferior quality. The plaintiff sold the barley with a similar warranty to a person who sustained damage from an inferior crop, and it was held that the plaintiff, being liable for the damage to his vendee, might recover the amount from the defendant. In *Davis* v. *Garrett* (*d*) the master of the defendants' barge, which had on board the plaintiff's lime, unnecessarily deviated from the usual course, and during the deviation a tempest wetted the lime, and, the barge taking fire, the whole was lost. It was held that the wrong of the master in taking the barge out of its proper course was a sufficiently proximate cause of the loss to entitle the plaintiff to recover in respect of it. Unless there was contributory negligence upon the part of the plaintiff, he is entitled to recover: *Bridge* v. *The Grand Junction Railway Company* (*e*).

(*a*) 3 H. & N. 164.
(*b*) 7 E. & B. 301; in error, 8 E. & B. 647.
(*c*) E. B. & E. 84.
(*d*) 6 Bing. 716.
(*e*) 3 M. & W. 244.

But the jury have found that neither the captain nor the pilot was to blame.

Huddleston, *Gray* and *H. James*, in support of the rule.—The damage is too remote. The case is not within either branch of the rule laid down in *Hadley* v. *Baxendale* (*a*), and approved of in *Fletcher* v. *Tayleur* (*b*), for the damage did not arise naturally, that is, according to the usual course of things, from not admitting the ship into the dock, nor was it such as might reasonably be supposed to have been in the contemplation of both parties. *Hadley* v. *Baxendale* did not introduce any new doctrine, but laid down a rule in accordance with the civil law, the French law and American law: Sedgwick on Damages, chap. iii., p. 57, 2nd ed. In Kent's Commentaries, vol. 2, p. 665, 10th ed., note, it is laid down that "damages for breaches of contract are only those which are incidental to, and directly caused by, the breach, and may reasonably be supposed to have entered into the contemplation of the parties; and not speculative profits, or accidental or consequential losses, or the loss of a fancied good bargain." If the ship had been injured by collision while at anchor opposite the dock, or had sunk during a hurricane, could it be contended that the defendants would have been liable? How could the defendants have contemplated the possibility of the ship having too little ballast, and that a gale of wind would arise? If they could have contemplated the latter the captain should also have contemplated it, and put more ballast in the ship. The injury arose from three causes, the want of ballast, the gale, and the not being let into the dock. The immediate cause was the want of ballast, which prevented the captain from taking the ship into a place of safety; the causa causans was the gale, the not being let

(*a*) 9 Exch. 341. (*b*) 17 C. B. 21.

1866.
WILSON v. NEWPORT DOCK CO.

into the dock was only the sine qua non. [*Pollock*, C. B., referred to *Gee* v. *The Lancashire and Yorkshire Railway Company* (*a*).] In *Gibbs* v. *The Trustees of the Liverpool Docks* (*b*) the defendants neglected a duty imposed upon them by statute, and for the performance of which tolls were granted to them, which they received. *Collen* v. *Wright* (*c*) was the case of a person who induced another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, and notice was given to him that the bill for a specific performance would be proceeded with, and he would be held liable for costs unless he retracted the assertion. In *Randall* v. *Raper* (*d*) the action was for a breach of warranty, and the damages were clearly within the contemplation of the parties.

Cur adv. vult.

The learned Judges having differed in opinion the following judgments were delivered.

MARTIN, B.—This is a rule calling upon the plaintiff to shew cause why a nonsuit should not be entered in pursuance of leave reserved, or why there should not be a new trial. The declaration stated that the defendants were proprietors of a dock for the reception of ships on and communicating with the river Usk; that the plaintiff was the owner of a ship, and that in consideration that the plaintiff would cause the ship to be brought at a certain time and on a certain day towards and to the said dock for the purpose of being docked, for reward to th defendants, they promised to receive and dock the sa

(*a*) 6 H. & N. 211.
(*b*) 8 E. & B. 647.
(*c*) 6 H. & N. 164.
(*d*) E. B. & E. 84.

ship. The declaration then averred that the plaintiff did cause the ship to be brought, at the time and on the day agreed on, towards and to the said dock; that he was entitled to have the ship docked in accordance with the defendants' promise. But that the defendants did not receive and dock the said ship, and by reason thereof the ship was left in the said river, and at the ebbing of the tide grounded and sustained damage. The defendants pleaded payment of 15*l.* into Court, and that it was enough to satisfy the plaintiff's claim. The plaintiff replied that it was not, and thereupon issue was joined.

The cause came on to be tried, before my brother *Byles*, at the last Monmouth Assizes, and *the facts proved are very simple and clear.*—(His lordship then stated the facts, as above set forth, *ante*, p. 233).

The learned Judge adds that the facts were entirely for the jury, and that he does not disapprove of their finding. I concur with him, and I think his direction that the verdict should be entered for the plaintiff was right in point of law.

The question of damages is of constant occurrence; it occurs in almost every action of contract, except contracts for the payment of a certain fixed sum of money, and necessarily in every action for a wrong. Ordinary cases on contracts are actions for the non-delivery or non-acceptance of goods agreed to be sold; on agreements for the sale of land; for breaches of promise to marry; for non-acceptance or non-delivery of stock or shares; and an infinite variety of others might be named. So also in actions for wrongs it occurs every day, for instance, in actions for injuries sustained by accidents on railways and by collision which now constitute a very considerable number of the causes tried at nisi prius—in actions for libel and slander, for assault or false imprisonment, and in

1866.
WILSON
v.
NEWPORT
DOCK CO.

numberless other cases. In some instances the measure of damages is fixed and ascertained by long established usage; for instance for the non-delivery of goods, which are the subject of common sale in the market. I apprehend a Judge is bound to tell the jury that the measure of damages is the difference between the contract price and the market price, and that if he does not his summing up would be liable to objection, and there are other cases in which like long usage has fixed the measure of damages. So also in some cases the matter of damages has been the subject of decision in the superior Courts, and I apprehend that when this has been so the decision is a binding authority upon the same and other Courts in like manner and to the same extent as other decisions. For instance, the case of *Hadley* v. *Baxendale* (*a*), which was frequently referred to in the argument, is a decision of this kind. The plaintiffs, who were millers, had delivered to the defendants, common carriers of goods for hire at Gloucester, a broken iron shaft to be carried by them to Greenwich and delivered to an engineer there, in order to enable him to use it as a model for making a new shaft. They were told that the mill was stopped in consequence of the shaft being broken, and they promised that if the shaft was sent before a certain hour it would be delivered at Greenwich on the following morning. The delivery of the shaft was delayed by some neglect, and the plaintiffs did not receive the new shaft for several days after the time they otherwise would have done, and they claimed damages for the loss of profit which they would have made had the new shaft been delivered earlier. The late Mr. Justice *Crompton* left the case generally to the jury, who found a verdict for the plaintiffs. A rule was granted by the Court of Exchequer for a new trial for misdirection, because they were of opinion that

(*a*) 9 Exch. 341.

the Judge ought to have told the jury to exclude the loss of profit. This case is therefore an authority that in a similar case such loss of profit cannot be made an element of damages, and must be excluded, but it is an authority no further, and anything said by the Court in delivering judgment is to be judged by its being consonant to law and reason. The decision in *Hadley* v. *Baxendale* is therefore no authority whatever in the present case, for no loss of profits is claimed; nor is it an authority that loss of profits is not a legitimate element of damages in many other cases, for instance in a railway accident whereby a tradesman or workman is prevented from attending to his business by the injury sustained. The loss of profits in such cases is a constant element of damages, and in a case tried the other day at Liverpool, where so large a sum as 7000*l.* was given in a case under Lord Campbell's Act, the sole element of damages was the loss of profits of the deceased in his profession of a surgeon, and no objection was made on this ground, and I have no doubt whatever that if the Judge had told the jury to exclude it there would have been misdirection.

In regard to the present case there is no established rule and no decision, and the general rule is to be applied. This rule is that the damage to be compensated for ought to be proximate to and not remote from the breach of contract or the wrong, and ought fairly and reasonably and naturally to arise from them. I do not adopt the qualifications mentioned by Mr. Baron *Alderson* in the judgment in *Hadley* v. *Baxendale* as applicable to every case. They may have been perfectly right there, but they are not of universal application. "Naturally," he says, "means according *to the usual course of things*; but contracts are infinite in variety; and suppose, as in this case, no such claim for damage has ever been known to have been made, no usual

1866.
WILSON v. NEWPORT DOCK CO.

course of things exists; but the damages to be recovered by the plaintiff are not, in my opinion, therefore, to be nominal, and, he proceeds to say, or "such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it." Now this may properly enough be taken into consideration in the case of carriers and their customers, but in the bulk of broken contracts it has no application whatever. Parties entering into contracts contemplate that they will be performed and not broken, and in the infinite majority of instances the damages to arise from the breach never enter into their contemplation at all. As to *Hadley* v. *Baxendale*, I was a party to it, and have no desire to deprecate it. But in *Boyd* v. *Fitt* (*a*) the Court of Exchequer dissented from it, and approved of the views of the late Mr. Justice *Crompton* and Sir *James Wilde* as being sounder expositions of the law as to remoteness of damages: *Smeed* v. *Foord* (*b*), *Gee* v. *The Lancashire and Yorkshire Railway Company* (*c*). The general rule is therefore to be applied to the present case, and ought, as all other general rules, to be fairly, candidly and impartially applied. It has been said that the damage sustained here has been very great. Now I am clearly of opinion that this ought to be no element whatever in the application of the rule, and whether the damage be 10*l.* or 10,000*l.* is immaterial.

The circumstances are these:—In pursuance of the defendants' contract to admit the ship into the dock at a certain time upon a certain day, the ship was brought to the entrance to the dock. The defendants could not admit her in consequence of a defect in a chain of the dock-gate, and their contract is admitted to have been

(*a*) 14 Irish C. L. R. 43. 56. (*b*) 1 E. & E. 602.
(*c*) 6 H. & N. 211.

broken. No blame attaches to them. It was their misfortune that the chain had been broken. The ship was then left in the river, which is one emptying itself into the Bristol Channel, where the tide flows and ebbs to a very great height. The captain had to decide what was to be done under the circumstances in which he was placed. Four courses have been suggested as open to him, one that he should remain and anchor where he was. Secondly, that he should have gone up the river towards the place from whence he came. Thirdly, that he should have gone down to West Point, where it was said the ship would upon the ebb have settled upon soft mud; and, fourthly, that he should have gone into deep water, where the ship would have always been afloat. Now I think the defendants had a right to a bonâ fide and reasonably sound judgment exercised upon this matter. The captain decided upon remaining where he was: the tide was ebbing and the weather threatening. If either of the other three courses had been adopted it might have been that the ship would have sustained no damage, but it might have been that she would have been totally lost; but I think that this was a question for the jury, and that they have decided it. They have found that the captain did the best he could under the circumstances, and was not guilty of any negligence. The consequence was that when the tide ebbed the ship took the ground and sustained damage; and the question which has been argued before us is, that the damage is too remote and so unconnected with the cause of action that it must, as matter of law, be borne by the plaintiff, and that the defendants cannot be responsible for it.

I do not concur in this view. There has been damage. It must be borne by some one. Neither the plaintiff or his captain are in the slightest default. If the defendants

1866.
WILSON v. NEWPORT DOCK CO.

had performed their contract no damage would hav occurred. In consequence of their default the captai was compelled to exercise his judgment and discretio and the jury have found that he did the best he coul and was guilty of no negligence, by which I unde stand that in deciding to remain where he was he e ercised such judgment and discretion as became reasonable and prudent man. His doing so was no doul the immediate cause of the damage, but in my opinio his remaining there was in contemplation of law the sam as if the ship had been compelled to remain there by v major. The rule is that the damage must be proximat (not immediate) and fairly and reasonably connected wit the breach of contract or wrong. As to what is so di ferent much will differ, but many instances could be mer tioned in which damages much more remote than the preser were held to be the subject of compensation; *Powell* v *Salisbury* (a). There is a case of constant occurrence i Guildhall. A barge is injured by a collision in the Thame she is taken to the nearest convenient and fitting place o the shore; upon the ebbing of the tide she comes dow upon a pile and sustains further damage. My own beli is that compensation for such damage has been recovere over and over again without objection, and upon referenc to some gentlemen at the bar whose experience upon th subject is the greatest in the profession, I have been in formed that it has uniformly been so. Such damage i precisely analogous to the present.

Some possible cases were mentioned in the argumen and it was asked whether the defendant would have bee responsible. One was if the ship had been run down b another ship whilst at anchor. I think the liability in suc case would depend upon the circumstances, and a materi

(a) 2 Y. & J. 391.

one would be whether the running down ship was in the wrong. Another case put was if the ship had been upset when she was anchored by a hurricane. That, I think, would raise a question for the jury whether in all human probability the same misfortune would not have happened to the ship wherever in the river she happened to have been.

In my opinion the discussion of instances like these is of very little bearing or weight when the facts of the case to be adjudicated upon are clear and undenied. In questions of damages each case must be determined upon its own circumstances. But I think the point is decided by authority: *Jones* v. *Boyce* (*a*). The plaintiff was a passenger by a stage coach; a rein broke; the coachman drove the coach towards the side of the road, and one of the wheels was stopped by a post. The plaintiff jumped off, and his leg was broken, and he brought the action against the coach proprietor for damages. Lord *Ellenborough* said there were two questions for the jury, first as to the defendant's default (in regard to the rein), which is immaterial to the present case. The second was whether the defendants' default was conducive to the injury which the plaintiff had sustained, for if it was not so far conducive as to create such a reasonable degree of alarm and apprehension in the mind of the plaintiff as rendered it necessary for him to jump down from the coach in order to avoid immediate danger, the action was not maintainable.

Amongst observations upon the peculiar circumstances of that case he said that it was for the consideration of the jury whether the plaintiff's act was such as a reasonable and prudent mind would have adopted; and he added, "If I place a man in such a situation that he must adopt a perilous alternative I am responsible for the consequences." I think the present case is analogous. The

(*a*) 1 Stark. N. P. C. 493.

1866.
WILSON v. NEWPORT DOCK CO.

defendants did not perform their contract to admit the ship into the dock. They thereby imposed upon the captain four perilous alternatives: he adopted one. The jury found that he did the best he could, and was guilty of no negligence; and damage ensued to the ship. In my opinion the defendants' default directly conduced to this damage, and they are responsible for it upon the principle enunciated by Lord *Ellenborough* in *Jones* v. *Boyce*, which is equally good law and good sense.

For these reasons I think the damage is not too remote; that the learned Judge submitted the right question to the jury, and I concur with him that the verdict is unobjectionable, and that therefore the rule should be discharged.

POLLOCK, C. B.—The judgment which I am about to deliver is that of my brothers *Channell*, *Pigott* and myself.

This case comes before us on a point reserved at the trial, viz., "*whether the damages were too remote;*" and to assist our judgment we have first, the notes of the learned Judge taken at the trial; secondly, the answer of the jury, "*that the pilot and the captain did the best they could under the circumstances, and were neither of them guilty of any negligence;*" and we have the fact that the jury (who were locked up till a late hour) could not agree on the question, "*whether there was in fact any place of safety to which the vessel might have been taken;*" and the questions for our decision seem to be: first, ought the verdict to stand—not a verdict found by the jury, but entered for the plaintiff by the learned Judge on the jury answering one question, and being *unable* to agree upon another question, which we think the more important and decisive of the two?: or secondly, ought we to enter the verdict for the defendants?: or thirdly, ought we to direct a new trial?

In deciding these questions, it is necessary to ascertain

the facts of the case *as found by the jury*, for with evidence so contradictory and repugnant we cannot find any verdict ourselves,—it is not our province. If the facts can be ascertained then, what is the law applicable to them? We apprehend, when the facts are *known*, it is the province of the Court to say for *what matters* damages are to be given; but the *amount of damages is a question for the jury*, quite as much as the credit due to the witnesses. When the result of the evidence is uncertain, it is for the jury to find the facts, and therefore they will often have to find whether the facts fall within the rule of law to be laid down on the subject. The case of *Hadley* v. *Baxendale* (*a*) was cited at the trial, and much commented on during the argument. That case was very much considered; the argument took place several weeks before the judgment was given, and I know that great pains were bestowed upon it. Lord *Wensleydale*, the late Baron *Alderson*, and my brother *Martin* were parties to it, and it is due to Lord *Wensleydale* and the late Baron *Alderson* to say, that a more extensive and accurate knowledge of decisions in our law books, and a more acute power of analysing and discussing them, and, as far as my brother *Martin* is concerned, a larger acquaintance with the exigencies of commerce and the business of life, never combined to assist at the formation of any decision; and certainly it does not lessen the authority of that case that Lord *Campbell* in *Smeed* v. *Foord* (*b*) said, that it merely affirmed what was to be found in Pothier, in Chancellor Kent's Commentaries, 2nd vol., p. 665 (and in all the other authorities in the French Code), and it may be added, that Mr. Justice *Crompton* (against whose summing up it was directed in that same case) said he agreed with it as far as it went—which we consider to be agreeing with it altogether. That decision was not presented as any new

(*a*) 9 Exch. 341. (*b*) 1 E. & E. 602.

1866.
WILSON v. NEWPORT DOCK CO.

discovery in jurisprudence, but we think it put in a clearer and more distinct light a principle which had been previously recognised in prior cases, and the want of which in the English law had been pointed out. The authorities are all collected in a note to *Vicars* v. *Wilcocks*, in the 2nd vol. of Smith's Leading Cases, 4th edition, by Mr. Justice *Willes* and Mr. Justice *Keating*. It is quite true, as remarked by Sir James *Wilde*, that the case is not applicable to, and does not decide every case — *no rule, no formula* could do that — cases of damage differ as much as the leaves of a tree differ from each other, or rather the leaves of different trees—no two are exactly alike, and one description cannot be applicable to all. No precise, positive rule can embrace all cases, and notwithstanding any rule of law that may be laid down, it must be admitted after all that the question of the amount of damages is one for the jury, and *the jury only;* and provided the law on the subject be properly laid down by the presiding Judge, and then the amount of damages be left at large to the jury, we apprehend a Court would not interfere with their verdict, because the jury had apparently come to some compromise among themselves and had not strictly observed the supposed rule of law. We think that the decision of twelve jurymen instructed from the bench in the rules of law, but exercising their own judgment on a subject connected with the business of life with which they are familiar, would practically lead to a result often more just and equitable than any mere rule of law could arrive at; and that there may be no mistake as to our meaning, we may add that should this case go to a second trial, some of the jury might think the plaintiff entitled to recover the whole damage, others might think it the height of imprudence on the part of the master to attempt to remove a vessel from a dry dock to a wet dock about the

time when the wind was blowing a hurricane, which from his evidence seems to have been the case, and from which charge of imprudence the verdict of the jury has not relieved him. The result might be a compromise which we are confident the Court would not, and which we think they ought not to disturb.

We think we are not able to determine from the materials before us, whether or no the loss was occasioned by circumstances which, according to the case of *Hadley* v. *Baxendale* and the other authorities would make the Dock Company liable for the damage the ship sustained. If the state of the weather was the efficient cause of the loss we think the defendants are not liable. Now as to the state of the wind the evidence of the *mate* is—"*not much wind*—blowing *pretty stiff*, a *fresh breeze*." The evidence of the captain was, "*It was only a few hours before a perfect hurricane.*" James Dunster, the master rigger, says, "*It was blowing so hard it would not have been safe to take her into deep water.*" If the weather was such that on being excluded from the dock she had no alternative but to perish on account of the gale or hurricane, which seems to me to have been the opinion of the master, then it may be doubted whether she ought to have been taken to the dock-gates at all in such a state of the weather, and the opinion of the jury by a verdict should have been obtained on these and other circumstances, and the verdict ought to have been found by them on a larger issue than whether the master and the pilot *did their best after they found the vessel could not be received into the dock*, which I take to be the only finding of the jury. It is clear that the pilot thought the master was obstinate and determined to do nothing to save the ship. We cannot find the defendants liable to this damage, because the jury were disposed to relieve the captain and the pilot from the

1866.
WILSON v. NEWPORT DOCK CO.

odium of a charge of negligence; the verdict of the jury ought to have gone more *into the merits in order to fix the defendants with these damages;* what the jury *did not find* and could not agree upon was quite as important as what they did find, and the result of their verdict seems to be—"*We cannot agree as to the liability of the defendants but we desire to throw no blame on the captain or the pilot.*"

We are therefore of opinion that the jury have not found enough in point of fact to enable us to decide that the verdict entered for the plaintiff is what would have been their verdict, or (referring to the evidence actually given) *ought to have been,* if the entire case had been left to them to find a verdict for the plaintiff or the defendant. Looking at the evidence and the finding of the jury, we cannot come to any conclusion that would make the defendants responsible for the damage done to the vessel. If there was any place of safety to which the vessel *might* have been taken and *could have been taken* (which we think is included in the learned Judge's question), we think the plaintiffs are not entitled to recover. The jury could not agree on an answer to this question. If they had found this question in the affirmative, we think the plaintiff was clearly not entitled to recover, and we presume the Judge would have directed a verdict for the defendants, but after many hours they could not agree. It is plain that some of the jury were of opinion in the affirmative. It is true that they found that neither the captain nor the pilot were guilty of negligence, but we think it very uncertain what they meant by that finding; they certainly did not mean by that finding inferentially to decide the other question, or they would have found it and not ultimately disagreed about it. If there was a safe place to which the vessel might and *ought to have been* taken, a verdict for the plaintiff would be a great act of injustice, and we

are invited to find this *for the jury* by a process of reasoning, when the jury *would not*, apparently *could not*, and certainly did not find it for themselves.

As to entering a verdict for the defendant, there is a similar difficulty (though perhaps not so great, because if the plaintiff does not establish his case the defendant is entitled to a verdict), but we think we cannot be certain what would have been the verdict of the jury if they had gone into and had decided upon the whole case for themselves. We think, therefore, there ought to be a new trial.

Rule for a new trial.

IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

OAKLEY *v.* MONCK.

Feb. 7.

Where a lessee, after the expiration of his lease, remains in possession and pays rent it is a question for the jury upon what terms his tenancy continues.

ERROR on the judgment of the Court of Exchequer in making absolute a rule to enter the verdict for the defendant, pursuant to leave reserved at the trial. The pleadings and facts fully appear in the report of the case in the Court below, 3 H. & C. 706.

O'Malley (with whom was *Merewether* (*a*), now argued

A tenant for life granted a lease containing a covenant that he would, at the expiration of the term, pay and allow the lessee, a nurseryman, for all fruit trees and shrubs then on the premises, which had been planted by him. At the expiration of the lease, the lessee continued in possession and paid rent, and upon the death of the tenant for life he paid the same rent to the remainderman, who was not aware of the covenant in the lease.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court below), that there was no evidence for the jury that the tenancy continued upon the terms of the lease so as to bind the remainderman by the covenant.

(*a*) Before *Willes*, J., *Blackburn*, J., *Keating*, J., *Mellor*, J., *Montague Smith*, J., and *Lush*, J.

1866.
OAKLEY
v.
MONCK.

for the plaintiff.—The argument was in substance the sam as the Court below, and the same authorities were cited.

Keane (*Douglas Browne* with him) appeared for th defendant, but was not called upon to argue.

WILLES, J.—We are all of opinion that the judgment c the Court below ought to be affirmed. It is impossible t read the case without feeling that some hardship may b sustained, inasmuch as property which the intestate migh have removed, under the ordinary rule respecting fixture if he had taken the proper course at the proper time, ma be lost to his estate. If, however, any equity arises out o the transaction, that will be a subject for the consideratio of the defendant. Whether any allowance ought to b made to the plaintiff, in respect of the fruit trees, is matter of good conscience, and cannot affect the lega question which he has raised by insisting that under th terms of the original lease the defendant is bound to tak the trees and pay for them at a valuation.

The question for our consideration is whether the de fendant has so conducted herself, and to be under a obligation to fulfil terms corresponding with those of th covenant in the lease. The covenant is to this effect,— that all fruit trees brought by the lessee upon the land an remaining there at the expiration of the lease shall be take by the lessor and paid for upon a valuation. The lesso was tenant for life, and the lease having expired th lessee did not insist upon the performance of the covenant but continued to occupy the land at the same rent an upon terms corresponding with all the covenants in th lease not inconsistent with a tenancy from year to year Probably, though it is not necessary to give an opinion o that point, if the landlord had determined the tenancy b

a notice to quit, the tenant would have been entitled to call upon him to pay for the fruit trees. The landlord died, and then the tenant had a right to call upon his personal representative to take the trees at a valuation (assuming the covenant not inconsistent with a tenancy from year to year); or he might have exercised the ordinary right of a tenant to remove at the expiration of his term all property in the nature of tenant's fixtures. But, instead of taking either of those courses, the tenant preferred remaining in possession and paying rent to the defendant, which he did until his death. There is nothing in the case to prove that the defendant took upon herself the burthen of the covenant in the lease, or any similar contract. The first tenancy from year to year was determined by the death of the original landlord, and a new tenancy from year to year was created; for though it would be popularly called a continuing tenancy, it was in point of law a new demise. There is nothing to shew that it was part of the terms of that tenancy that the defendant should pay for the fruit trees. The improbability that a tenant for life should enter into such a contract is pointed out by my brother *Bramwell* in his judgment in the Court below. It is expressly found that nothing passed as to the terms upon which the occupation was to continue, and we must assume that there was no knowledge on the part of the defendant not only of the covenants in the lease, but of the existence of the lease.

Then what is the conclusion resulting from that state of facts? The defendant agreed that the original tenant should continue to hold and pay rent, and, no particular terms being mentioned, we must assume that it was a tenancy from year to year subject to the usual terms, according to the custom of the country. It is said that a

1866.
OAKLEY v. MONCK.

special provision must be superadded because it was a term of the previous tenancy, though in point of law there was no continuance of that tenancy but a new one. Then was there evidence of an assent by the defendant to the terms contained in the lease, for without an assent there could be no contract? There was in fact no evidence, and all that can be assumed is the contract which is usual in the place where the premises lie, not any special term contained in a lease, of which the defendant was not bound to know. I do not rely on the improbability of a tenant for life assenting to such a condition, but it is satisfactory that in deciding in accordance with common sense we are deciding in accordance with the law.

Certain difficulties have been suggested by Mr. *O'Malley*, the chief of which was that unless this special term is imported into the contract, and the landlord is bound by it without his assent, he would be subject to one set of terms and the tenant would hold on another, which would be a solecism. In answer, a case might be put which would present as great a solecism of a different description. Assume that the original lessor had survived the late tenant, and that the plaintiff, his personal representative, had continued to hold (the lease having expired and been given up, or for some other cause not having come to his knowledge): assume further that the lessor had died during the tenancy of the present plaintiff; in such case neither the tenant nor the landlord would be aware of the terms of the lease; and if we put one solecism against the other, it would be a greater absurdity to conclude that one party should be bound by, and the other take advantage of, a contract of which they were both ignorant, than to hold that the contract was void for want of mutuality. But in truth there is no difficulty, for in every case it is a question of fact. A tenant stipulates, as he supposes, with the

agent of his landlord, that the landlord shall repair a particular fence. After the tenant has paid rent for several years he calls upon the landlord to repair the fence; upon which the agent insists that there was no such stipulation; and the jury find that there was a mistake as to the terms of the agreement. But the mistake has not the effect of rendering the contract void, for the principal object of it being the letting of the land, a tenancy is created and the landlord may recover rent. A case (*a*) occurred a short time ago, where an indenture of lease was cancelled by the mutual consent of both parties, and it was nevertheless held that the tenure and rent remained.

BLACKBURN, J.—I am also of opinion that the judgment of the Court below ought to be affirmed. It appears from the case that the plaintiff is the representative of the tenant who was in the occupation of the land, and paying rent at the time the defendant became tenant for life. The defendant knowing that 11*l.* a year had been paid for the premises, continued to receive the same rent. By the payment and acceptance of rent a tenancy from year to year was created upon the ordinary terms; unless there is evidence that the parties agreed to any other terms, and then those terms must be superadded. If both parties had known that the terms upon which the premises were previously held were certain special terms, that would be reasonable evidence from which a jury might draw the inference that they agreed that the premises should be held on those special terms. But it is impossible to incorporate those terms into the agreement unless they were known. Where the continuing to hold after the expiration of a lease

(*a*) *Lord Ward* v. *Lumley*, 5 H. & N. 87.

1866.
OAKLEY v. MONCK

is evidence of a tenancy from year to year, it does not follow that all the terms of the lease are incorporated, but only those which are applicable to such a tenancy. Of course, there may be a case in which a new landlord may say to his tenant, "I know that you have been holding upon such and such terms, and I agree that you shall continue to hold upon those terms." But if there is no such agreement, the mere receipt of rent is no evidence of an agreement to hold upon special terms, unless they are known to each party.

Applying those principles to the present case, it appears that there had been a lease which contained a covenant that the lessor should at the expiration of the lease take all fruit trees and shrubs planted by the lessee at a valuation. I do not construe that covenant as Mr. *O'Malley* has done. A nurseryman has a right to remove shrubs, but not to destroy trees; and I do not understand that the lessee deprived himself of his right to remove his stock-in-trade. The lease expired at Michaelmas, 1847, and the lessor, who was tenant for life, allowed the lessee to continue in possession upon the same terms as before. That might have led a jury to draw the conclusion that all the terms of the lease were incorporated with the yearly tenancy. But the lessor died in April, 1856, and the defendant, who became tenant for life of the premises, was utterly ignorant of the terms of the lease, and, as pointed out in the Court below, it is very improbable that she would have agreed to such a condition as this if she had known of it. How, therefore, can it be supposed that she agreed to terms of which she knew nothing?

KEATING, J.—I am also of opinion that the judgment of the Court below ought to be affirmed, on the simple ground

that the case finds as a fact that the defendant was ignorant of the terms of the lease.

1866.
OAKLEY v. MONCK.

MELLOR, J., MONTAGUE SMITH, J., and LUSH, J., concurred.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

CARR *v.* LAMBERT, WOODHALL and Others.

Feb. 8.

Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that in a claim of common of pasture for cattle levant and couchant upon land appurtenant thereto, the expression "levant and couchant" means such a number of cattle as the land might maintain by its produce beyond the amount of food obtained by them from the common, and that it is not necessary that they should be actually fed, either wholly or in part, from the produce of the land.

THIS was an appeal against the decision of the Court of Exchequer in making absolute a rule to enter the verdict for the defendants, pursuant to leave reserved at the trial. The pleadings sufficiently appear in the report of the case in the Court below: 4 H. & C. 499.

The case on appeal stated the facts as follows:—It was proved at the trial that at the time of the alleged trespasses the defendant John Woodhall was possessed of a toftstead, consisting of a cottage and stable with a garden and orchard of the extent of about two acres. Evidence was given that about fifty years before the commencement of the action this had been planted with fruit trees, but before that time it was swarth, and had been depastured with cattle. No direct evidence was given as to the number of cattle which it had then supported or was capable of supporting, and

1866.
CARR
v.
LAMBERT.

no point was raised at the trial on either side as to the necessity of proof on this subject.

After a great deal of evidence had been given, the learned Judge suggested that on the evidence the fact seemed clear that the owners of the toftstead had as of right turned the cattle housed on the toftstead, but not deriving their sustenance therefrom, on the locus in quo for more than thirty years, and that the only question was one of law, viz., whether such a right of common was legal, or, in other words, if such cattle were "levant and couchant." Both sides assented to this suggestion, and no other question was required to be or was in fact left to the jury; and thereupon the learned Judge directed a verdict to be entered for the plaintiff, reserving leave to the defendants to move to enter the verdict for them.

Hayes, Serjt. (*Kemplay* with him), argued for the plaintiff (*a*).—The peculiarity of the case is that for more than thirty years the defendants' cattle have not been "levant and couchant" upon the toftstead in respect of which the right to depasture the plaintiff's land is claimed. The judgment of the Court below proceeds on the ground that the expression "levant and couchant" means, first, the potentiality of the dominant tenement to support cattle, and, secondly, the measure of the number which it would suffice to feed if cultivated for that purpose. But there is no authority that a right of common of pasture exists for cattle which are not fed either wholly or in part upon the land in respect of which the right is claimed. No doubt the term "levant and couchant" is a loose expression. It is used in the sense pointed out by *Bailey*, J., in *Cheesman* v. *Hardham* (*b*), and also in the sense pointed out by

(*a*) Feb. 7. Before *Willes*, J., *Blackburn*, J., *Keating*, J., *Mellor*, J., *Smith*, J., and *Lush*, J.

(*b*) 1 B. & Ald. 706. 711.

the Court below in their judgment. The right is for common appendant, not appurtenant, and common appendant can only be claimed in respect of arable land: *Tyrringham's Case* (*a*), Com. Dig. tit. "Common" (B.). Therefore the term "levant and couchant" means such a number of cattle as actually till and manure the land: *Whitelock* v. *Hutchinson* (*b*), *Bennett* v. *Reeve* (*c*). The plea would be bad unless it averred that the cattle were actually levant and couchant upon the toftstead: 3 Chit. Plead., p. 275, 7th ed. The reason why such an averment is necessary is that levancy and couchancy is the measure of the number which the land supports: 1 Wms. Saund., p. 346 *c*, note (2); and as that is uncertain it is called common without number: 1 Wms. Saund., p. 28 *d*, note (4). In *Patrick* v. *Lowre* (*d*) the defendant prescribed for common of pasture for all beasts levant and couchant upon a certain house; but after verdict the Court would intend that there was a curtilage annexed to the house. *Scholes* v. *Hargreaves* (*e*) only shews that there must be some land on which the cattle may be fed; if it is built upon or converted into a reservoir the right would be gone. *Rumsey* v. *Rawson* (*f*) is an authority that at least some part of the land in respect of which the right is claimed must be applied to the sustenance of the cattle.

Field (*T. P. Thompson* with him), for the defendants.—The term "levant and couchant" is the measure of the number of cattle which the land is capable of supporting if used for that purpose. If at any time there was land which afforded sustenance for cattle, the right of common would not be lost or suspended by cattle not being fed upon it.

(*a*) 4 Rep. 37 b.
(*b*) 2 Moo. & Rob. 206.
(*c*) Willes, 227.
(*d*) Brownl. part 2, 101.
(*e*) 5 T. R. 46.
(*f*) 1 Vent. 18.

1866.
CARR
v.
LAMBERT.

Tyrringham's Case (*a*) is an authority in favour of the defendants. There common appendant was claimed in respect of arable land, part of which had been converted into pasture, and it was held that the common remained appendant; and as in common appurtenant it was necessary that there should be a measure of the number of cattle, that measure was the levancy and couchancy, viz., so many cattle as the land *might* maintain. That is the definition of "levant and couchant" in *Cole* v. *Foxman* (*b*). "Levant and couchant" has a different meaning where a right of common of pasture is claimed and where there is a distress for surcharging a common. In the latter case it must be proved that the cattle have been actually fed upon the common; in the former it is only necessary to shew that the land *might* maintain them: *Cheesman* v. *Hardham* (*c*), *Fulcher* v. *Scales* (*d*), *Rogers* v. *Benstead* (*e*). The dictum of *Parke*, B., in *Whitelock* v. *Hutchinson* (*f*) has reference to common appendant; here the right claimed is for common appurtenant. Suppose, instead of feeding the cattle on the produce of the land, they were fed on oil cake, and the hay or root crops sold, would the right of common be extinguished? Or, suppose a house or stable was built upon a part of the land, must there be an inquiry how many cattle its diminished pasture will sustain? [*Blackburn*, J.—Would an improvement of the dominant tenement give a right to the owner to put more cattle on the common? *Willes*, J.—It is well known that at the present time a greater number of cattle may be supported upon a given quantity of land than in the time of Richard the First. Suppose that, by improved cultivation, the land was rendered capable of sustaining double the number of cattle,

(*a*) 4 Rep. 37 b.
(*b*) Noy. 30.
(*c*) 1 B. & Ald. 706.
(*d*) 1 Sel. N. P. 484, 12th ed.
(*e*) Id.
(*f*) 2 Moo. & Rob. 206.

but in a few years it became exhausted.] Those considerations shew that the true meaning of "levant and couchant" is the number of cattle which the land is capable of supporting, and not the number which have actually been fed upon it.

Hayes, Serjt., replied.

Cur. adv. vult.

WILLES, J., now said.—We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed. The main argument on the part of the plaintiff was, that the character of the dominant tenement had been so altered from its condition of pasture land by having had buildings placed upon a part of it, and by the rest being converted into orchard and garden ground, that the user for thirty years of the common by cattle housed upon the dominant tenement, but not deriving their support from it, was no evidence of a right which could in point of law exist. That argument would have had considerable force if upon the facts it could have been established that the character of the dominant tenement was so altered that it was incapable of producing fruits to support cattle; for instance, if it could have been shewn that a town was built upon it, or, as suggested in the course of the argument, if it had been converted into a reservoir, the question might have arisen whether the right of common was not extinguished or at least suspended. It is unnecessary for the decision of the present case to express any opinion upon that point, because it appears that the toftstead consisted of a cottage and stable with a garden and orchard of about two acres. There was therefore land which might have been laid down as meadow, or cultivated so as to produce artificial roots for feeding cattle. Consequently, this is not the case of a dominant tenement so changed in its character that cattle

1866.
CARR
v.
LAMBERT.

could not be fed off its produce. Then, even if my brother *Hayes* had succeeded in satisfying the Court that the expression "levant and couchant" was not a mere measure of the capacity of the land to keep a given number of cattle out of its products, whether natural or artificial, but that it had reference to the capacity of the land in its actual state to produce food for cattle, he has not succeeded in shewing that the facts negative the capacity of the land for that purpose. The evidence is consistent with this state of things—land in a state of cultivation so as to be capable of sustaining cattle, afterwards partly built upon, and the rest turned into a garden and orchard, not, it is true, with a view to sustain cattle, but in such a state that it might at any time be made to produce fruits for that purpose.

There is no authority either in the class of cases relating to the abandonment or the loss or the suspension of such rights, by the destruction, absolute or temporary, of the necessary measure of enjoyment, which would justify us in holding that, under these circumstances, the right of common once created and existing was destroyed by the subsequent acts of the owner of the toftstead. User and long enjoyment ought to be referred to a legal origin, if the facts are consistent with it, rather than be treated as a series of trespasses, and we ought to assume a legal origin, unless the facts shew that it could not be attributed to the enjoyment, or the right has been extinguished or suspended.

For these reasons we think that the enjoyment is referrable to a legal origin, and there is nothing to shew that the right so created was extinguished or suspended. That was the ground on which the judgment of the Court below proceeded, and I think it must be within the experience of all who have heard trials with respect to rights of common of this description that the judgment is in accordance with the direction usually given in such cases, viz., that the expression "levant and couchant" is rather the measure

of the capacity of the land to maintain cattle than a condition to be complied with as necessary to the right, by the cattle actually lying down and getting up on the land or being sustained by the fruits thereof. For these reasons we think that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

FLETCHER *v.* RYLANDS and Another.

Feb.

A person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in *at his peril*, and, if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape.

THIS was a proceeding in error on the judgment of the Court of Exchequer for the defendants on a special case stated by an arbitrator for the opinion of that Court. The special case (so far as material) is fully set forth in the report of the case in the Court below: 3 H. & C. 774.

The defendant made a reservoir for water on his land, and in the selection of the site and the planning and construction of the reservoir employed a competent engineer and competent contractors. In excavating the bed of the reservoir five old shafts were met with, running vertically downwards to old coal workings under the site of the reservoir, and communicating with the plaintiff's colliery by means of other old coal workings under intervening lands. These shafts were filled with soil of the same kind as that which immediately surrounded them, and it was not known to or suspected by the defendants, or the persons employed by them in planning or constructing the reservoir, that they were shafts which had been made for the purpose of getting coal under the land beneath the reservoir, or that they led down to coal workings under its site. When the reservoir was completed, and partially filled with water, one of these shafts burst downwards, in consequence of which the water flowed into the old workings underneath the reservoir, and by means of the underground communications into the plaintiff's colliery, and flooded it. There was no personal negligence or default on the part of the defendants, but reasonable and proper care and skill were not exercised by the persons employed, with reference to the shafts, to provide for the sufficiency of the reservoir to bear the pressure of water which, when filled, it would have to bear.

Held, in the Exchequer Chamber (reversing the judgment of the majority of the Court of Exchequer), that under these circumstances the defendants were responsible for the damage done to the plaintiff by the water from the reservoir flooding his colliery

1866.

FLETCHER v. RYLANDS.

Manisty (*C. Russell* with him) argued for the plaintiff (*a*). —The owner or occupier of land is bound to use it so as not to cause injury to others: and if, by constructing an artificial work, more especially for the purpose of impounding a dangerous element like water, damage results, he is liable to make compensation for it. It makes no difference that the plaintiff and defendants hold under the same landlord. The plaintiff had acquired certain rights before the defendants made their reservoir. [*Willes*, J.—This is like the case of a person throwing a cannon ball down a hill, and then saying that he did not expect that anyone was there.] Every person has a right to enjoy his property free from any injurious consequences resulting from the mode in which his neighbour uses his property. If the owner of land has a right to use a stream flowing through it, and an adjoining landowner interferes with the natural course of the stream, either by confining it with a dam or causing it to flow in such large quantities that damage ensues, he is bound to make compensation: *Backhouse* v. *Bonomi* (*b*). The plaintiff does not complain of the result of natural causes, or of injury to which he has conduced; he has only worked his mine in the manner he had a right to do. The true principles which govern this case were laid down in *Lambert* v. *Bessey* (*c*). Suppose the reservoir, instead of being constructed by excavating the ground, had been built upon the surface and surrounded with walls, which had burst, would not the defendants have been liable? The wrong is the impounding water which gets loose and does injury. Having constructed the reservoir, the defendants were under a legal obligation to keep the water within it: *Hodgkinson* v. *Ennor* (*d*). There is no

(*a*) Feb. 8. Before *Willes*, J., *Blackburn*, J., *Keating*, J., *Mellor*, J., *Montague Smith* J., and *Lush*, J.

(*b*) 9 H. L. 503.

(*c*) Sir T. Raym. 421.

(*d*) 4 B. & S. 229.

authority against the position contended for. *Smith* v. *Kenrick* (*a*) only decided that if a mine-owner works to the extent of his boundary, and an adjoining mine-owner, on a higher level, works in the ordinary course up to his boundary, the former cannot complain that water flows into his mine. *Baird* v. *Williamson* (*b*) establishes that the owner of the mine on the lower level is not bound to receive water which does not flow in its natural course; and that if the owner of the mine on the higher level does any act by which foreign water flows into his neighbour's mine, he is responsible. *Aldred's Case* (*c*) is a distinct authority that a man has no right to use his land so as to injure his neighbour. The doctrine laid down in *Bagnall* v. *The London and North Western Railway Company* (*d*) applies to this case. The principle which governs it was enunciated by *Blackburn*, J., in *Williams* v. *Groucott* (*e*), viz., "that when a party alters things from their normal condition so as to render them dangerous to *already acquired* rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights." The judgment of *Gibbs*, C. J., in *Sutton* v. *Clarke* (*f*) supports the view contended for. *Chauntler* v. *Robinson* (*g*) is an authority that, although the owner or occupier of a house is under no obligation to keep it in repair, he is bound to keep it in such a state that his neighbour may not be injured by its fall. In *Chadwick* v. *Trower* (*h*) the plaintiff had no right of support, so as to impose on the defendant the obligation either of giving him notice of the defendant's intention to pull down his vault, or of using care in pulling it down.

(*a*) 7 C. B. 515.
(*b*) 15 C. B. N. S. 376.
(*c*) 9 Rep. 57 a.
(*d*) 7 H. & N. 423; in error, 1 H. & C. 544.
(*e*) 4 B. & S. 149.
(*f*) 6 Taunt. 29.
(*g*) 4 Exch. 163.
(*h*) 6 Bing. N. C. 1.

1866.

FLETCHER v. RYLANDS.

Mellish (*T. Jones* with him), for the defendants.—If all the land had remained in its natural state, the reservoir could not have caused any damage to the plaintiff. The damage has been occasioned by secret acts done partly by strangers and partly by the plaintiff. If the plaintiff had not worked his mine beyond the boundary the damage would not have ensued. No doubt, the case is the same as if the plaintiff and defendants were respectively owners in fee of the land they occupy. But the only obligation on the part of the defendants was to take due care in using their land not to injure their neighbour's; and they could not be guilty of negligence unless they had knowledge that what they were doing would cause injury. The argument for the plaintiff must go to this extent, that every owner of real property is liable for damage arising from a lawful act done upon his own land, although he has been guilty of no negligence, and has no knowledge, or means of knowledge, that what he did would occasion any damage. No such law exists with respect to injury to the person or personal property. A person who is injured must prove an act of trespass or negligence. So in the case of damage to personal property the law gives no remedy unless the injury is wilful or caused by negligence or the breach of some duty. The same law prevails with respect to real property, and it must be proved that the injury arose from a trespass or a nuisance or negligence, or the violation of some right. This case is distinguishable from those where a right exists by reason of contiguity of property, as in *Backhouse* v. *Bonomi* (*a*). Where there is a right to support, it makes no difference whether it is a natural or an acquired right; if the right is violated, an action lies. Here the plaintiff and defendants have, as against each other, no right except that which is common to everyone, not to have his person or

(*a*) 9 H. L. 503.

personal or real property injured. The case is also distinguishable from those where a person, in order to get rid of a noxious liquid, discharges it into a stream, as in *Hodgkinson* v. *Ennor* (*a*); for there the act is wilful, and is done with knowledge that the liquid must flow somewhere where it would probably cause damage. Here the defendants were ignorant of any circumstances which rendered it necessary for them to take any care as regards the plaintiff. This case does not differ in principle from the ordinary action for negligence. In *Scott* v. *The London and Saint Katherine's Dock Company* (*b*), where the plaintiff was injured by a bale of cotton falling upon him, if there had been no negligence the action could not have been maintained. So, if a person negligently or wilfully causes water to inundate his neighbour's land, he is liable for the consequences; but if he not only intends to keep the water but uses the utmost care to prevent its flowing away, how has he committed a wrongful act? [*Willes*, J., referred to *Gregory* v. *Piper* (*c*).] There the servant could not execute the order of his master without committing a trespass; here the act of the defendants was lawful. *Lambert* v. *Bessey* (*d*) was the case of a trespass. In *Baird* v. *Williamson* (*e*) the defendant wilfully caused water to flow into the plaintiff's mine. *Aldred's Case* (*f*) was the ordinary case of a nuisance. In *Bagnall* v. *The London and North Western Railway Company* (*g*) the defendants violated a duty imposed upon them by act of parliament. Prior to the 6 Ann. c. 31, by the custom of the realm an action on the case might be maintained against a person whose house took fire and thereby consumed his neighbour's house:

(*a*) 4 B. & S. 229.
(*b*) 3 H. & C. 596.
(*c*) 9 B. & C. 591.
(*d*) Sir T. Raym. 421.
(*e*) 15 C. B. N. S. 376.
(*f*) 9 Rep. 57 a.
(*g*) 7 H. & N. 423; in error, 1 H. & C. 544.

1866.
FLETCHER v. RYLANDS.

Tubervil v. *Stamp* (*a*), *Filliter* v. *Phippard* (*b*), Com. Dig. tit. Action upon the Case for Negligence (A. 6). The fair inference is that, independently of custom, no action would lie without proof of negligence. If a man is riding and his horse runs away, he is not liable for damage which ensues. Where the act causing damage is only the sine qua non, not the proximate cause, there is no liability unless there is negligence. In *Tenant* v. *Golding* (*c*) there was a neglect of duty on the part of the defendant in not repairing the wall. The observation of *Gibbs*, C. J., in *Sutton* v. *Clarke* (*d*) is a mere dictum, and must be taken secundum subjectam materiam. *Chadwick* v. *Trower* (*e*) shews that there can be no negligence unless there is knowledge, or the means of knowledge, that peculiar care is requisite. Here there are no circumstances which rendered it the duty of the defendants to take peculiar care, more especially when damage would not have happened if the land had remained in its natural state. A man is not liable to an action on the case unless he has committed a wrongful act, but how can it be a wrongful act not to take care against something of which he had no knowledge or means of knowledge? Even if the defendants had the means of knowledge they would not, under the circumstances, be liable for the negligence of the contractors whom they employed: *Butler* v. *Hunter* (*f*).

Manisty, in reply, argued that the causing the water to inundate the plaintiff's mine was a trespass, and that it made no difference whether it was foul water or pure water. [*Willes*, J., referred to *Cox* v. *Burbidge* (*g*).]

Cur. adv. vult.

(*a*) 1 Salk 13.
(*b*) 11 Q. B. 347.
(*c*) 1 Salk. 21. 360; 2 Ld. Raym. 1089.
(*d*) 6 Taunt. 29. 44.
(*e*) 6 Bing. N. C. 1.
(*f*) 7 H. & N. 826.
(*g*) 13 C. B. N. S. 430.

The judgment of the Court was delivered, in the following Easter Vacation (May 14), by

BLACKBURN, J.—This was a special case stated by an arbitrator under an order of nisi prius, in which the question for the Court is stated to be whether the plaintiff is entitled to recover any, and, if any, what damages from the defendant by reason of the matters thereinbefore stated.

In the Court of Exchequer the Chief Baron and *Martin*, B., were of opinion that the plaintiff was not entitled to recover at all; *Bramwell*, B., being of a different opinion. The judgment in the Exchequer was consequently given for the defendant in conformity with the opinion of the majority of the Court.

The only question argued before us was, whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover. We have come to the conclusion that the opinion of *Bramwell*, B., was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants by reason of the matters stated in the case, and consequently that the judgment below should be reversed; but we cannot at present say to what damages the plaintiff is entitled.

It appears from the statement in the case that the plaintiff was damaged by his property being flooded by water which, without any fault on his part, broke out of a reservoir constructed on the defendant's land by the defendant's orders, and maintained by the defendant.

It also appears from the statement in the case (*a*) that the coal under the defendant's land had, at some remote period, been worked out; but that this was unknown at the time when the defendant gave directions to erect the reservoir,

(*a*) 3 H. & C. 777.

1866.
FLETCHER v. RYLANDS.

and the water in the reservoir would not have escaped from the defendant's land, and no mischief would have been done to the plaintiff but for this latent defect in the defendant's subsoil. And it further appears (*a*) that the defendant selected competent engineers and contractors to make his reservoir, and himself personally continued in total ignorance of what we have called the latent defect in the subsoil, but that those persons employed by him in the course of the work became aware of the existence of ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.

It is found that the defendant personally was free from all blame; but that in fact proper care and skill was not used by the persons employed by him to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was that the reservoir, when filled with water, burst into the shafts, the water flowed down through them into the old workings, and thence into plaintiff's mine, and there did the mischief.

The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendant is responsible. The question of law therefore arises: What is the obligation which the law casts on a person who, like the defendant, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there in order that it may not escape and damage his neighbour's, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exche-

(*a*) 3 H. & C. 779.

quer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more.

If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape.

If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, viz., whether the defendant is not so far identified with the contractors whom he employed as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in *at his peril*, and if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy,

1866.
FLETCHER v. RYLANDS.

or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue; or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land to prevent their escaping and doing mischief.

The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man he will be answerable for that too.

As early as the Year Book, 20 Ed. 4, 11, placitum 10, *Brian*, C. J., lays down the doctrine in terms very much resembling those used by Lord *Holt* in *Tenant* v. *Goldwin* (which will be referred to afterwards). It was trespass with cattle. Plea, that the plaintiff's land adjoined a place where defendant had common; that the cattle strayed

from the common, and defendant drove them back as soon as he could. It was held a bad plea. *Brian* says:—"It behoves him to use his common so that it shall do no hurt to another man, and if the land in which he has common be not enclosed it behoves him to keep the beasts in the common and out of the land of any other." He adds, where it was proposed to amend by pleading that they were driven out of the common by dogs, that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went.

In the recent case of *Cox* v. *Burbidge* (*a*) *Williams*, J., says:—"I apprehend the law to be perfectly plain. If I am the owner of an animal in which by the law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." So in *May* v. *Burdett* (*b*) the Court, after an elaborate examination of the old precedents and authorities, came to the conclusion that "a person keeping a mischievous animal is bound to keep it secure *at his peril*." And in 1 Hale's Pleas of the Crown, 430, Lord *Hale* states that where one keeps a beast knowing that its nature or habits were such that the natural consequences of his being loose is that he will harm men, the owner "must at his peril keep him up safe from doing hurt, for *though he use his diligence* to keep him up, if he escape and do harm, the owner is liable to answer damages," though, as he proceeds to shew, he will not be liable criminally without proof of want of care. In these latter authorities the point under consideration was damage to the person, and what was

(*a*) 13 C. B. N. S. 438. (*b*) 9 Q. B. 112.

1866.
FLETCHER v. RYLANDS.

decided was that where it was known that hurt to tl person was the natural consequence of the animal bei loose, the owner should be responsible in damages for su hurt, though where it was not known to be so the own was not responsible for such damages; but where the dama is, like eating grass and other ordinary ingredients damage feasant, the natural consequence of the escape, tl rule as to keeping in the animal is the same. In Co Dig. "Droit" (M. 2) it is said, that "if the owner 200 acres in a common moor enfeoffs B. of 50 acres,] ought to enclose *at his peril* to prevent damage by h cattle to the other 150 acres. For if his cattle esca thither they may be distrained damage feasant. So tl owner of the 150 acres ought to prevent his cattle fro doing damage to the 50 acres *at his peril.*

The authority cited is Dyer, pp. 372-6, where the decisi was that the cattle might be distrained; the inference fro that decision, that the owner was bound to keep in h cattle *at his peril,* is, we think, legitimate; and we have tl high authority of Comyns for saying that such is the law.

In the note to Fitzherbert, Natura Brevium, p. 12 which is attributed to Lord *Hale,* it is said:—"If A. a B. have lands adjoining, where there is no enclosure, tl one shall have trespass against the other on an escape their beasts respectively; Dyer, 372; Rastal Ent. 62 20 Ed. 4, 10; although wild dogs, &c., drive the cattle the one into the lands of the other."

No case is known to us in which in replevin it has ev been attempted to plead in bar to an avowry for distre damage feasant that the cattle had escaped without a negligence on the part of the plaintiff, and surely, if th could have been a good plea in bar, the facts must oft have been such as would have supported it. These auth rities, and the absence of any authority to the contra justify *Williams,* J., in saying, as he does in *Cox*

Burbidge (*a*), that the law is clear that in actions for damage occasioned by animals that have not been kept in by their owners it is quite immaterial whether the escape is by negligence or not.

As has been already said there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stenches, or other thing which will if it escape naturally do damage, to prevent their escaping and injuring his neighbour, and the case of *Tenant* v. *Golding* (*b*) is an express authority that the duty is the same, and is to keep them in at his peril.

As *Martin*, B., in his judgment below, appears not to have understood that case in the same manner as we do, it is proper to examine it in some detail. It was a motion in arrest of judgment after judgment by default, and therefore all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 Modern. It alleged that the plaintiff had a cellar which lies contiguous to a messuage of defendant "and used (solebat) to be separated and fenced from a privy house of office, parcel of the said messuage of defendant, by a thick and close wall which belongs to the said messuage of the defendant, and by the defendant of right ought to have been repaired (jure debuit reparari)." Yet he did not repair it, and for want of repair filth flowed into plaintiff's cellar.

The case is reported both by *Salkeld*, who argued it, in 6 Modern, and by Lord *Raymond*, whose report is the fullest. The objection taken was that there was nothing to shew that the defendant was under any obligation to repair the wall, that, it was said, being a charge not of

(*a*) 13 C. B. N. S. 438.
(*b*) 1 Salk. 21, 360; 2 Ld. Raym. 1089; 6 Modern R. 311.

1866.
FLETCHER v. RYLANDS.

common right, and the allegation that defendant de debuit reparari being an inference of law which did arise from the facts alleged. *Salkeld* argued that general mode of stating the right was sufficient in a de ration; and also that the duty alleged did of com right result from the facts stated. It is not now mat to inquire whether he was or was not right on the pl ing point. All three reports concur in saying that I *Holt* during the argument intimated an opinion ag him on that, but that, after consideration, the Court judgment for him on the second ground.

In the report in 6 Modern it is stated:—"An another day per totam curiam. The declaration is g for there is a sufficient cause of action appearing in it *not upon the word solebat.* If the defendant has a hou office inclosed with a wall which is his, he is of com right bound to use it so as not to annoy another." * The reason here is "that one must use his own, so as the not to hurt another, and as of common right one is b to keep his cattle from trespassing on his neighbour, is bound to use anything that is his so as not to hurt an by such user." * * * "Suppose one sells a piece of pa lying open to another piece of pasture which the ve has, the vendee is bound to keep his cattle from run into the vendor's piece; so of dung or anything There is here an evident allusion to the same case in as is referred to in Com. Dig. "Droit" (M. 2.) Raymond, in his report, says:—"The last day of *Holt,* C. J., delivered the opinion of the Court tha declaration was sufficient. He said that upon the fa this declaration there appeared a sufficient cause of a to entitle the plaintiff to have his judgment; *that the not go upon the solebat, or the jure debuit reparari* as were enough to say that the plaintiff had a house, an defendant had a wall, and he ought to repair the wall;

if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it. * * * The reason of this case is upon this account, that every one must so use his own as not to do damage to another; and, as every man is bound so to look to his cattle as to keep them out of his neighbour's ground that so he may receive no damage, so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbour." * * * "So if a man has two pieces of land which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So a man shall not lay his dung so high as to damage his neighbour, and the reason of these cases is because every man must so use his own as not to damnify another." *Salkeld*, who had been counsel in the case, reports the judgment much more concisely, but to the same effect. He says:—"The reason he gave for his judgment was because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was a trespass on his neighbour as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's * * * he must repair the wall of his house of office, for he whose dirt it is must keep it that it may not trespass." It is worth noticing how completely the reason of Lord *Holt* corresponds with that of *Brian*, C. J., in the case already cited in 20 Ed. 4. *Martin*, B., in the Court below, says that he thinks this was a case without difficulty, because the defendant had, by letting judgment go by default, admitted his liability to repair the wall, and that he cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will shew that it was because Lord

1866.
FLETCHER v. RYLANDS.

Holt and his colleagues thought (no matter for this purpose whether rightly or wrongly) that the liability was *not* admitted, that they took so much trouble to consider what liability the law would raise from the admitted facts; and it does therefore seem to us to be a very weighty authority in support of the position that he who brings and keeps anything, no matter whether beasts, or filth, or clean water, or a heap of earth or dung, on his premises, must, at his peril, prevent it from getting on his neighbour's, or make good all the damage which is the natural consequence of its doing so.

No case has been found in which the question as to the liability for noxious vapours escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they had, at great expense, erected contrivances by which the fumes of chlorine were condensed and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the jury that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighbourhood. The jury however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shewn; yet if the law be as laid down by the majority of

the Court of Exchequer it would have been a very obvious defence. If it had been raised, the answer would probably have been that the uniform course of pleading in actions for such nuisances is to say that the defendant caused the noisome vapours to arise on his premises and suffered them to come on the plaintiff's, without stating that there was any want of care or skill on the defendant, and that the case of *Tenant* v. *Goldwin* shewed that this was founded on the general rule of law that he whose stuff it is must keep it that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching and the other by drowning; and he who brings them there must, at his peril, see that they do not escape and do that mischief. What is said by *Gibbs*, C. J., in *Sutton* v. *Clarke* (*a*), though not necessary for the decision of the case, shews that that very learned Judge took the same view of the law that was taken by Lord *Holt*.

But it was further said by *Martin*, B., that when damage is done to personal property, or even to the person, by collision either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true; and, as was pointed out by Mr. *Mellish* during his argument before us, this is not confined to cases of collision; for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger: *Hammack* v. *White* (*b*); or where a person in a dock is struck by the falling of a bale of cotton which the defendants' servants are lowering: *Scott* v. *London Dock Company* (*c*); and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing

(*a*) 6 Taunt. 44. (*b*) 11 C. B. N. S. 588.
(*c*) 3 H. & C. 596.

1866.
FLETCHER v. RYLANDS.

those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the license of the owners, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what primâ facia was a trespass can be explained on the same principle, viz., that the circumstances were such as to shew that the plaintiff had taken that risk upon himself. But there is no ground for saying that the plaintiff, here, took upon himself any risk arising from the uses to which the defendant should choose to apply his land. He neither knew what there might be, nor could he in any way controul the defendant, or hinder his building what reservoirs he liked, and storing up in them what water he pleased, so long as the defendant succeeded in preventing the water which he there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendant would or would not be responsible for the want of care and skill in the persons employed by him under the circumstances stated in the case (*a*).

We are of opinion that the plaintiff is entitled to recover; but as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the principle, the case may be mentioned again.

Judgment reversed.

(*a*) 3 H. & C. 779.

Exchequer Reports. 1866.

EASTER TERM, 29 VICT.

RULES OF COURT

FOR

REGULATING THE PROCEDURE AND PRACTICE IN SUITS BY ENGLISH INFORMATION.

INDEX.

REGULÆ GENERALES.

THE Right Honorable Sir FREDERICK POLLOCK, Knight, Lord Chief Baron of Her Majesty's Court of Exchequer, and Sir SAMUEL MARTIN, Knight, Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knight, Sir WILLIAM FRY CHANNELL, Knight, and Sir GILLERY PIGOTT, Knight, Barons of the same Court, do hereby, in pursuance and execution of the power given them by "The Crown Suits, &c. Act, 1865," and of every or any other power or authority enabling them in this behalf, order and direct in manner following:—

1866.

REGULÆ GENERALES.

RULE I.

Printing of Informations.

Consolidated Chancery Orders, IX. 3, page 37.

I. Informations shall be printed on cream wove machine drawing foolscap folio paper, 19 lbs. per mill ream, in pica type, leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two and a half inches wide, and dates and sums occurring therein shall be expressed in figures instead of words. Every information shall be divided into paragraphs, numbered consecutively.

Consolidated Chancery Orders, XI. 19, and page 199, Rule 4.

Ib. p. 132.

2. The payment to be made by a defendant for such printed copies of the information as he requires, shall be at the rate of one halfpenny per folio of 72 words.

RULE II.

Service of Copy of Information and Appearance.

Ib. X. 3.

1. Where a defendant within the jurisdiction of the Court is served with a copy of an information in manner provided by "The Crown Suits, &c. Act, 1865," he must appear thereto within eight days after the service of such copy.

Ib. X. 4.

2. Where any defendant, not appearing to be an infant or a person of weak or unsound mind, unable of himself to defend the suit, is, when within the jurisdiction of the Court, duly served with a copy of the information, in manner provided by "The Crown Suits, &c. Act, 1865," and refuses or neglects to appear thereto within eight days after such service, the informant may, after the expiration of such eight days, and within three weeks from the time of such service, apply to the Queen's Remembrancer to enter an appearance for such defendant, and no appearance having been entered, the Queen's Remembrancer shall enter such appearance accordingly, upon being satisfied by affidavit that the copy of the information was duly served; and after the expiration of such three weeks, or after the time allowed to such defendant for appearing has expired, in any case in which the Queen's Remembrancer is not hereby required to enter such appearance, the informant may apply to the Court or a Judge for leave to enter such appearance for such defendant, and the Court or Judge being satisfied that the copy of the information was duly served, and that no appearance has been entered for such defendant, may, if it deem fit, order the same accordingly.

Ib. X. 5.

3. Any appearance entered at the instance of the informant for a

1866.

REGULÆ GENERALES.

defendant, who at the time of the entry thereof is an infant or a person of weak or unsound mind, unable of himself to defend the suit, shall be irregular and of no validity.

Consolidated Chancery Orders, VII. 3.

4. Where, upon default made by a defendant in not appearing to or not answering an information, it appears to the Court or a Judge that such defendant is an infant or a person of weak or unsound mind not so found by inquisition, so that he is unable of himself to defend the suit, the Court or a Judge may, upon the application of the informant, order that some proper person be assigned guardian of such defendant, by whom he may appear to and answer or appear to or answer the information and defend the suit. But no such order shall be made unless it appears on the hearing of such application that a copy of the information was duly served in manner provided by "The Crown Suits, &c. Act, 1865," and that notice of such application was, after the expiration of the time allowed for appearing to or for answering the information, and at least six clear days before the day in such notice named for hearing the application served upon or left at the dwelling house of the person with whom or under whose care such defendant was at the time of serving such copy of the information, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling house of the father or guardian of such infant, unless the Court or Judge at the time of hearing such application shall dispense with such last-mentioned service.

Ib. X. 6.

5. Where the Court or a Judge is satisfied by sufficient evidence that any defendant has been within the jurisdiction of the Court at some time not more than two years before the information was filed, and that such defendant is out of the jurisdiction, or that upon inquiry at his usual place of abode (if he had any), or at any other place or places where at the time when the information was filed he might probably have been met with, he could not be found, so as to be served with a copy of the information, and that in either case there is just ground to believe that such defendant has gone out of the jurisdiction or otherwise absconded to avoid being served with such copy of the information or with other process, the Court or a Judge may order that such defendant do appear at a certain day to be named in the order, and a copy of such order, together with a notice to the effect set forth at the end of this clause, may, within fourteen days after such order made, be inserted in the *London Gazette*, and be otherwise published as the Court or a Judge may direct; and where the defendant does not appear within the time limited by such order,

1866.

REGULÆ GENERALES.

or within such further time as the Court or a Judge may appoint, then, on proof made of such publication of the order, the Court or a Judge may order an appearance to be entered for the defendant, on the application of the informant.

"Notice. A. B. Take notice, that if you do not appear, pursuant to the above order, the informant may enter an appearance for you, and the Court may afterwards grant to the informant such relief as he may appear to be entitled to on his own shewing."

Consolidated Chancery Orders, X. 7.

6. Where a person named as a defendant to an information is out of the jurisdiction of the Court.

(1.) The Court or a Judge, upon application supported by sufficient evidence in what place or country such defendant is or may probably be found, may order that a copy of the information, and if an answer is required, a copy of the interrogatories, may be served on such defendant in such place or country, or within such limits, as the Court or Judge shall think fit to direct.

(2.) Such order shall limit a time after such service within which such defendant is to appear to the information, such time to depend on the place or country within which the copy of the information is to be served; and where an answer is required such order shall also limit a time within which such defendant is to plead, answer, or demur, or obtain further time to make his defence to the information.

(3.) At the time when such copy of the information shall be served the informant shall also cause such defendant to be served with a copy of the order giving the informant leave to serve such copy of the information.

(4.) And if upon the expiration of the time for appearing it be shewn to the satisfaction of the Court or a Judge that such defendant was duly served with such copy of the information, and with a copy of the order, the Court or Judge may, upon the application of the informant, order an appearance to be entered for such defendant.

Ib. X. 9.

7. A defendant, notwithstanding that an appearance may have been entered for him by the informant, may afterwards enter an appearance for himself in the ordinary way, but such appearance by such defendant shall not affect any proceeding duly taken or any right acquired by the informant under or after the appearance entered by him, or prejudice the informant's right to be allowed the costs of the first appearance.

1866.

REGULÆ GENERALES.

8. Every party defending in person shall cause to be written or printed upon every demurrer, plea, answer, or other pleading or proceeding, and upon all instructions which he may leave at the Queen's Remembrancer's office for any appearance or other purpose, his name and place of residence, and also (if his place of residence shall be more than three miles from the Queen's Remembrancer's office) another proper place (to be called his address for service), which shall not be more than three miles from the said office, where writs, notices, and other documents, proceedings, and written communications may be left for him. Consolidated Chancery Orders, III. 5.

RULE III.

Amendment of Informations.

1. Where in amending an information no addition or insertion of more than 180 words in any one place is made, the information may be amended by written alterations in the printed information which has been filed, and by written additions on paper to be interleaved therewith, if necessary, but in all other cases the amendment must be made by a reprint of the information. Ib. IX. 18.

2. The practice of amending a defendant's copy of the information shall with respect to informations filed after these rules come into operation be abolished.

3. A copy of an amended information, whether upon an amendment by a reprint, or by such alterations and additions as mentioned in the first clause of this rule, shall be served upon the defendant or his solicitor, and such copy may be partly printed and partly written, if the amendment is not made by a reprint; and in every case the copy to be served shall be first so marked by the proper officer of the Court as to indicate the filing of such amended information, and the date of the filing or amendment thereof. Ib. IX. 20.

4. Where a defendant defends by a solicitor, service upon such solicitor of a copy of the amended information, whether wholly printed or partly printed and partly written, shall be good service on such defendant. Ib. IX. 21.

5. Where a defendant defends in person, service at the address for service of such defendant of a copy of the amended information, whether wholly printed or partly printed and partly written, shall be good service on such defendant. Ib. IX. 22.

RULE IV.

Interrogatories.

1. Where the informant requires an answer to an information from Ib. XI. 2.

1866.

REGULÆ GENERALES.

any defendant or defendants thereto, the interrogatories for the amination of such defendant or defendants shall be filed within ei days after the time limited for the appearance of such defendant defendants.

Consolidated Chancery Orders, XI. 3.

2. After the expiration of eight days from the time limited for appearance of any defendant, no interrogatories shall be filed for examination of such defendant without the special leave of the Co or of a Judge, granted upon the hearing of the parties.

Ib. XI. 4.

3. Where a defendant required to answer appears in person or his solicitor within the time limited for that purpose by the rules the Court, the informant shall, within eight days after the t allowed for such appearance, deliver to such defendant or to solicitor a copy of the interrogatories so filed as aforesaid, or of s of them as the particular defendant is required to answer; and copy so to be delivered shall be examined with the original by clerks of the Queen's Remembrancer, and they, on finding that same is properly written, shall mark the same as an office copy.

Ib. XI. 5.

4. Where a defendant to a suit does not appear in person or by own solicitor within the time allowed for that purpose by the rule the Court, and the informant files interrogatories for his examinat the informant may deliver a copy of such interrogatories so exami and marked as aforesaid to such defendant, at any time after the t allowed to such defendant to appear, and before his appearanc person or by his own solicitor, or the informant may deliver a cop such interrogatories so examined and marked as aforesaid to defendant or his solicitor after the appearance of such defendan person or by his own solicitor, but within eight days after s appearance.

RULE V.

Times allowed in Procedure.

Ib. XXXVII. 3.

1. A defendant may demur alone to an information within tw days after his appearance thereto, but not afterwards.

Ib. XXXVII. 4.

2. A defendant required to answer an information, whether orig or amended, must put in his plea, answer, or demurrer thereto, demurring alone, within twenty-eight days from the delivery to or his solicitor of a copy of the interrogatories which he is require answer, or within such further time as the Court or a Judge allow.

If he does not he is subject to the following liabilities:

(1.) An attachment may be issued against him.

(2.) If the sheriff takes the defendant under the attachment,

accepts bail, and makes his return accordingly, the informant may by motion of course obtain an order directed to the tipstaff of her Majesty's Court of Exchequer, to bring the defendant to the bar of the Court, and upon the defendant's being brought to the bar of the Court, the Court may, if it think fit, absolutely commit him to Whitecross Street Prison until he has put in his answer.

(3.) If the sheriff under the attachment arrests the defendant, and sends him to prison, or, finding him already in custody, detains him, and makes his return accordingly, the informant may by motion of course obtain a writ of habeas corpus to bring the defendant to the bar of the Court, and upon the defendant's being so brought to the bar of the Court, the Court may, if it think fit, absolutely commit him to Whitecross Street Prison until he has put in his answer.

(4.) The informant may file a traversing note, or proceed to have the information taken pro confesso against the defendant.

Consolidated Chancery Orders, XXXVII.

3. A defendant who is served with a copy of an information, whether original or amended, and is not required to answer the same, may, without any leave of the Court or a Judge, put in a plea, answer, or demurrer, not demurring alone, within fourteen days after the expiration of the time within which he might if required to answer, and appearing within the time limited for his appearance, have been served with interrogatories for his examination in answer to the information.

Ib. XXXVII. 6.

4. Where a defendant is ordered to answer amendments and exceptions together, he must put in his further answer to the amendments within fourteen days after he shall have been served with interrogatories for his examination in answer to the amended information, or within such further time as the Court or a Judge may allow. If he does not he is subject to the same liabilities as are mentioned in the second clause of this rule.

5. The answer of a defendant shall be deemed sufficient.

(1.) Where no exceptions for insufficiency are filed thereto within six weeks after the filing of such answer.

(2.) Where exceptions being filed the informant does not set them down to be argued in the term next following the filing of such exceptions.

(3.) Where a further answer is filed, and the old exceptions are not set down to be argued in the term next following the filing of such further answer.

Ib. XXXIII. 2.

6. Unless the Court or a Judge give special leave to the contrary, there must be at least two clear days between the service of a notice

1866.

REGULÆ GENERALES.

of motion and a day named in the notice for hearing the motion. And in the computation of two such clear days Sundays and other days in which the Queen's Remembrancer's office is closed shall not be reckoned.

7. The times limited in this and the others of these rules shall apply both to town and country causes, and in all cases not provided for by these rules the times in all causes shall be the same as those heretofore allowed in town causes.

RULE VI.

Printing of Answers.

Chancery Order of 6th March, 1860.

1. The practice of engrossing answers on parchment shall henceforth be discontinued, and a defendant (except as otherwise provided by the fifth clause of this rule) is to file his answer divided into paragraphs, numbered consecutively, and written bookwise upon paper of the same size and description as that on which informations are printed.

2. At the time when a defendant files his answer he is to leave with the Queen's Remembrancer a fair copy thereof (without the schedules (if any) of accounts or documents), and the clerks of the Queen's Remembrancer are to examine and correct such copy with the answer filed, and return it so examined, with a certificate thereon that it is correct and proper to be printed.

3. A defendant is then to cause his answer to be printed from such certified copy on paper of the same size and description, and in the same type, style, and manner on and in which informations are required to be printed, and before the expiration of four days from the filing of his answer is to leave a printed copy thereof with the Queen's Remembrancer, with a written certificate thereon by the defendant's solicitor, or by the defendant if defending in person, that such print is a true copy of the copy of the answer so certified; and if such printed copy shall not be so left the defendant shall be subject to the same liabilities as if no answer had been filed.

4. At any time after the expiration of such four days the defendant, within forty-eight hours after the same shall have been demanded in writing, is to have ready for delivery to the informant an official and certified printed copy of the answer.

5. Notwithstanding the preceding clauses of this rule, a defendant is to be at liberty to swear to and file a printed answer.

6. On receiving from the informant a demand for an official and

certified printed copy of the answer, the defendant is to get a printed copy thereof examined by the clerks of the Queen's Remembrancer with the answer as filed, and to stamp such copy with a stamp for *5s.*; and the clerks of the Queen's Remembrancer, on finding that such copy is duly stamped and correct, are to certify thereon that the same is a correct copy, and to mark the same as an office copy.

7. Such copy is, on demand, to be delivered to the informant, who on receipt thereof is to pay to the defendant the amount of the stamp thereon, and at the rate of *4d.* per folio for the same.

8. The informant is also to be entitled to demand and receive from the defendant any additional number of printed copies of his answer not exceeding ten, on payment for the same at the rate of one halfpenny per folio.

9. After all the defendants who are required to answer shall have filed their answers, a co-defendant is to be entitled to demand and receive from any other defendant any number of printed copies of his answer, not exceeding six, on payment for the same at the rate of one halfpenny per folio.

10. Office copies of schedules to answers of accounts or documents are to be obtained according to the practice now existing for obtaining office copies of answers.

11. The clerks of the Queen's Remembrancer are not to certify or mark any printed copy of an answer which has any alteration or interlineation in writing.

12. No costs are to be allowed for any written brief of an answer, unless the Court or a Judge shall direct the allowance thereof.

13. The clauses of this rule, other than clause one, are not to apply to answers filed by defendants defending in formâ pauperis.

RULE VII.

Taking Informations Pro Confesso.

1. Upon the execution of an attachment for want of answer against any defendant, or at any time within three weeks afterwards, the informant may cause such defendant to be served with a notice of motion to be made on some day in the following term not less than fourteen days after the day of such service, that the information may be taken pro confesso against such defendant, and thereupon, unless such defendant has in the meantime put in his answer to the information, or obtained further time to answer the same, the Court, if it so think fit, may order the information to be taken pro confesso against such defendant, either immediately, or at such time, and upon such terms,

Consolidated Chancery Orders, XXII. 1.

1866.

REGULÆ GENERALES.

and subject to such conditions as under the circumstances of the case the Court shall think proper.

2. Where any defendant, whether within or not within the jurisdiction of the Court, does not put in his answer in due time after appearance entered by or for him, and the informant is unable with due diligence to procure a writ of attachment or any subsequent process for want of answer to be executed against such defendant by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then such defendant shall, for the purpose of enabling the informant to obtain an order to take the information pro confesso, be deemed to have absconded to avoid or to have refused to obey the process of the Court.

3. Where any defendant who under the second clause of this rule may be deemed to have absconded to avoid or to have refused to obey the process of the Court appears in person or by his own solicitor, the informant may serve upon such defendant or his solicitor a notice that on a day in such notice named (being not less than fourteen days after the service of such notice) the Court will be moved that the information may be taken pro confesso against such defendant; and the informant must upon the hearing of such motion satisfy the Court that such defendant ought under the provisions of the second clause of this rule to be deemed to have absconded to avoid or to have refused to obey the process of the Court; and the Court if so satisfied, and if an answer has not been filed, may, if it so think fit, order the information to be taken pro confesso against such defendant, either immediately or at such time or upon such further notice as under the circumstances of the case the Court may think proper.

4. Where any defendant who under the 2nd clause of this rule may be deemed to have absconded to avoid or to have refused to obey the process of the Court, has had an appearance entered for him under the 2nd, 5th, or 6th clause of Rule II., and does not afterwards appear in person or by his own solicitor, the informant may cause to be inserted in the *London Gazette* a notice that on a day in such notice named (being not less than four weeks after the first insertion of such notice in the *London Gazette*), the Court will be moved that the information may be taken pro confesso against such defendant, and the informant must upon the hearing of such motion satisfy the Court that such defendant ought, under the provisionsof the 2nd clause of this rule, to be deemed to have absconded to avoid or to have refused to obey the process of the Court, and that such notice of motion has been inserted in the *London Gazette*

at least once in every entire week (reckoned from Sunday morning to Saturday evening) which shall have elapsed between the time of the first insertion thereof and the time for which the said notice is given; and the Court, if so satisfied, and if an answer has not been filed, may, if it so think fit, order the information to be taken pro confesso against such defendant, either immediately or at such time or upon such further notice as under the circumstances of the case the Court may think proper.

5. Any defendant, being in custody for want of his answer and submitting to have the information taken pro confesso against him, may apply to the Court upon motion, with notice to be served on the informant, to be discharged out of custody, and thereupon the Court may order the information to be taken pro confesso against such defendant, and may order him to be discharged out of custody upon such terms as appear to be just, unless it appears, from the nature of the informant's case, or otherwise to the satisfaction of the Court, that justice cannot be done to the informant without discovery or further discovery from such defendant.

6. No cause in which an order is made that an information be taken pro confesso against a defendant shall be heard on the same day on which the order is made, but the cause shall be set down to be heard, and the Court, if it so think fit, may appoint a special day for the hearing thereof.

7. A defendant against whom an order to take an information pro confesso is made may appear at the hearing of the cause, and where he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits as stated in the information.

8. Upon the hearing of a cause in which an information has been ordered to be taken pro confesso, such decree shall be made as to the Court shall seem just; and in the case of any defendant who has appeared at the hearing, and waived all objection to such order to take the information pro confesso, or against whom the order has been made after appearance by himself or his own solicitor, or upon notice served on him, or after the execution of a writ of attachment against him, the decree shall be absolute.

9. In pronouncing the decree the Court may, either upon the case stated in the information, or upon that case and a motion by the informant for the purpose, as the case may require, order a receiver of the real and personal estate of the defendant against whom the information has been ordered to be taken pro confesso to be appointed, with the usual directions, or direct a sequestration of such real and

1866.

REGULÆ GENERALES.

and subject to such conditions as under the circumstances of the case the Court shall think proper.

2. Where any defendant, whether within or not within the jurisdiction of the Court, does not put in his answer in due time after appearance entered by or for him, and the informant is unable with due diligence to procure a writ of attachment or any subsequent process for want of answer to be executed against such defendant by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then such defendant shall, for the purpose of enabling the informant to obtain an order to take the information pro confesso, be deemed to have absconded to avoid or to have refused to obey the process of the Court.

3. Where any defendant who under the second clause of this rule may be deemed to have absconded to avoid or to have refused to obey the process of the Court appears in person or by his own solicitor, the informant may serve upon such defendant or his solicitor a notice that on a day in such notice named (being not less than fourteen days after the service of such notice) the Court will be moved that the information may be taken pro confesso against such defendant; and the informant must upon the hearing of such motion satisfy the Court that such defendant ought under the provisions of the second clause of this rule to be deemed to have absconded to avoid or to have refused to obey the process of the Court; and the Court if so satisfied, and if an answer has not been filed, may, if it so think fit, order the information to be taken pro confesso against such defendant, either immediately or at such time or upon such further notice as under the circumstances of the case the Court may think proper.

4. Where any defendant who under the 2nd clause of this rule may be deemed to have absconded to avoid or to have refused to obey the process of the Court, has had an appearance entered for him under the 2nd, 5th, or 6th clause of Rule II., and does not afterwards appear in person or by his own solicitor, the informant may cause to be inserted in the *London Gazette* a notice that on a day in such notice named (being not less than four weeks after the first insertion of such notice in the *London Gazette*), the Court will be moved that the information may be taken pro confesso against such defendant, and the informant must upon the hearing of such motion satisfy the Court that such defendant ought, under the provisionsof the 2nd clause of this rule, to be deemed to have absconded to avoid or to have refused to obey the process of the Court, and that such notice of motion has been inserted in the *London Gazette*

at least once in every entire week (reckoned from Sunday morning to Saturday evening) which shall have elapsed between the time of the first insertion thereof and the time for which the said notice is given; and the Court, if so satisfied, and if an answer has not been filed, may, if it so think fit, order the information to be taken pro confesso against such defendant, either immediately or at such time or upon such further notice as under the circumstances of the case the Court may think proper.

5. Any defendant, being in custody for want of his answer and submitting to have the information taken pro confesso against him, may apply to the Court upon motion, with notice to be served on the informant, to be discharged out of custody, and thereupon the Court may order the information to be taken pro confesso against such defendant, and may order him to be discharged out of custody upon such terms as appear to be just, unless it appears, from the nature of the informant's case, or otherwise to the satisfaction of the Court, that justice cannot be done to the informant without discovery or further discovery from such defendant.

6. No cause in which an order is made that an information be taken pro confesso against a defendant shall be heard on the same day on which the order is made, but the cause shall be set down to be heard, and the Court, if it so think fit, may appoint a special day for the hearing thereof.

7. A defendant against whom an order to take an information pro confesso is made may appear at the hearing of the cause, and where he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits as stated in the information.

8. Upon the hearing of a cause in which an information has been ordered to be taken pro confesso, such decree shall be made as to the Court shall seem just; and in the case of any defendant who has appeared at the hearing, and waived all objection to such order to take the information pro confesso, or against whom the order has been made after appearance by himself or his own solicitor, or upon notice served on him, or after the execution of a writ of attachment against him, the decree shall be absolute.

9. In pronouncing the decree the Court may, either upon the case stated in the information, or upon that case and a motion by the informant for the purpose, as the case may require, order a receiver of the real and personal estate of the defendant against whom the information has been ordered to be taken pro confesso to be appointed, with the usual directions, or direct a sequestration of such real and

1866.

REGULÆ GENERALES.

personal estate to be issued, and may (if it appear to be just) direct payment to be made out of such real or personal estate of such sum of money as at the hearing or any subsequent stage of the cause the informant shall appear to be entitled to.

10. A decree founded on an information taken pro confesso is to be entered as other decrees.

11. After a decree founded on an information taken pro confesso has been entered, an office copy thereof shall (unless the Court shall dispense with service thereof) be served on the defendant against whom the order to take the information pro confesso was made, or his solicitor; and where the decree is not absolute, under the 8th clause of this rule, such defendant or his solicitor shall be at the same time served with a notice to the effect that if such defendant desires permission to answer the informant's information, and set aside the decree, application for that purpose must be made to the Court within the time specified in the notice, or that otherwise such defendant will be absolutely excluded from making any such application.

12. Where such notice as is mentioned in the last preceding clause of this rule is to be served within the jurisdiction of the Court, the time therein specified for such application to be made by the defendant shall be fourteen clear days after the service of such notice, or in case the Court be not sitting at the expiration of such fourteen clear days, then on the first day of the term next following the expiration of such fourteen clear days; but where such notice is to be served out of the jurisdiction of the Court, such time shall be specially appointed by the Court, on the ex parte application of the informant.

13. No proceeding shall be taken, and no receiver appointed under the decree, nor any sequestrator under any sequestration issued in pursuance thereof, shall take possession of or in any manner intermeddle with any part of the real or personal estate of a defendant, and no other process shall issue to compel performance of the decree, without leave of the Court or a Judge, to be obtained after notice served on such defendant or his solicitor, unless the Court or a Judge shall dispense with such service.

14. Any defendant waiving all objection to take the information pro confesso, and submitting to pay such costs as the Court may direct, may, before inrolment of the decree, have the cause re-heard upon the merits stated in the information, the petition for re-hearing being signed by counsel as other petitions for re-hearing.

15. Where a decree is not absolute, under the 8th clause of this

rule, the Court may order the same to be made absolute, on the motion of the informant made,—

(1.) After the expiration of three weeks from the service of a copy of the decree on a defendant, where the decree has been served within the jurisdiction:

(2.) After the expiration of the time limited by the notice provided for by the 11th clause of this rule, where the decree has been served without the jurisdiction:

(3.) After the expiration of three years from the date of the decree, where a defendant has not been served with a copy thereof:

And such order may be made either on the first hearing of such motion, or on the expiration of any further time which the Court may, on the hearing of such motion, allow to the defendant for moving for leave to answer the information.

16. Where the decree is not absolute, under the 8th clause, and has not been made absolute, under the 15th clause of this rule, and a defendant has a case upon merits not appearing in the information, he may apply to the Court by motion, supported by an affidavit stating such case, and submitting to such terms with respect to costs and otherwise as the Court may think reasonable, for leave to answer the information; and the Court, if satisfied that such case is proper to be submitted to the judgment of the Court, may, if it think fit and upon such terms as seem just, vacate the inrolment (if any) of the decree, and permit such defendant to answer the information; and where permission is so given to put in an answer, leave may be given to file a separate replication to such answer, and issue may be joined, and witnesses examined, and such proceedings had as if the decree had not been made, and no proceedings against such defendant had been had in the cause.

17. The rights and liabilities of any defendant under a decree made upon an information taken pro confesso shall extend to the representatives of any deceased defendant, and to any persons claiming under any person who was defendant, at the time when the decree was pronounced; and with reference to the altered state of parties and any new interests acquired, the Court may, upon motion served in such manner and supported by such evidence as under the circumstances of the case the Court may deem sufficient, permit such proceedings to be taken as the nature and circumstances of the case require, for the purpose of having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree (if not absolute) duly considered, and the rights of the parties duly ascertained and determined.

1866.

REGULÆ GENERALES.

RULE VIII.

Traversing Note.

Consolidated Chancery Orders, XIII. 1.

1. After the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone) to any information, whether original or amended before answer, which he has been required to answer, if such defendant has not filed any plea, answer, or demurrer, the informant may, if he think fit, file a note at the Queen's Remembrancer's Office to the following effect:—"The informant intends to proceed with the cause as if the defendant had filed an answer traversing the case made by the information."

Ib. XIII. 2.

2. After the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone) to an information, amended after answer, which he has been required to answer, if, such defendant has not filed any plea, answer, or demurrer, the informant may, if he think fit, file at the Queen's Remembrancer's Office a note to the following effect:—"The informant intends to proceed with the cause as if the defendant had filed an answer traversing the allegations introduced into the information by amendment."

Ib 3.

3. After the expiration of the time allowed to a defendant to put in his further answer to any information, if such defendant shall not have put in any further answer the informant may, if he think fit, file at the Queen's Remembrancer's Office a note to the following effect:—"The informant intends to proceed with the cause as if the defendant had filed a further answer traversing the allegations in the information whereon the exceptions are founded."

Ib. 4.

4. Where a demurrer or plea to the whole information is overruled, the informant, if he does not require an answer, may, if he think fit, immediately file his note in manner directed by the 1st or 2nd clause of this rule, as the case may require, and with the same effect, unless the Court, upon overruling such demurrer or plea, gives time to the defendant to plead, answer, or demur, and in such case, if the defendant does not file any plea, answer, or demurrer within the time so allowed by the Court, the informant, if he does not then require an answer, may, if he think fit, on the expiration of such time, file such note.

Ib. 5.

5. A traversing note having been filed, a copy thereof shall be served on the defendant against whom the same was filed.

Ib. 6.

6. The filing of a traversing note, and due service of a copy thereof, shall have the same effect as if the defendant, against whom

such note is filed, had filed a full answer, or further answer, traversing the whole information, or those parts of it to which the note relates, on the day on which the note was filed.

7. A defendant, after service of the copy of the traversing note filed against him as aforesaid, shall not plead, answer, or demur to the information, or put in any further answer thereto, without the special leave of the Court or a Judge, and the cause shall stand in the same situation as if such defendant had filed a full answer or further answer to the information on the day on which the note was filed.

RULE IX.

Replication and Joining Issue.

1. No subpœna to rejoin shall hereafter be issued, and only one replication shall be filed in each cause unless the Court or a Judge shall otherwise direct, and the replication shall be in the form set forth at the end of this rule, or as near thereto as circumstances admit, and upon the filing of such replication the cause shall be deemed to be completely at issue, and each defendant may without any rule or order proceed to verify his case by evidence, and the informant may in like manner proceed to verify his case by evidence, as soon as notice of the replication having been filed has been duly served on all the defendants who have filed an answer or plea, or against whom a traversing note has been filed, or who have not been required to answer and have not answered the information. Consolidated Chancery Orders, XVII. 2.

Form of Replication.

Between Informant and

Defendant.

The informant hereby joins issue with the defendants [*all the defendants who have answered or pleaded, or against whom a traversing note has been filed, or who have not been required to answer and have not answered the information*], and will hear the cause on information and answer against the defendants [*all the defendants against whom the cause is to be heard on information and answer*], and on the order to take the information pro confesso against the defendants [*all the defendants against whom the information is to be taken pro confesso*].

RULE X.

Evidence.

1. The mode of examining witnesses now in force, and all the Ib. sect. VIII.

1866.

REGULÆ GENERALES.

15 & 16 Vict. c. 26, § 28.

practice of the Court in relation thereto so far as the same are inconsistent with these rules, shall, from and after the time appointed for these rules to come into operation, be abolished; provided always that the Court or a Judge may, if it shall seem fit, order any particular witness or witnesses within the jurisdiction of the Court, or any witness or witnesses out of the jurisdiction of the Court, to be examined upon interrogatories in the mode now in force, or in such other mode as the Court or a Judge may direct; and that with respect to such witness or witnesses the practice of the Court in relation to the examination of witnesses shall continue in force, save only so far as the same may be varied by any order of the Court or a Judge in reference to any particular case.

Chancery Order, 5th February, 1861, rule 3.

2. The informant or any defendant may, at any time within fourteen days after issue has been joined in a cause, apply to a Judge by a summons to be served on the opposite party for an order that the evidence as to any facts or issues (such facts and issues to be distinctly and concisely specified in the summons) may be taken vivâ voce at the hearing of the cause, and the Judge may, if he shall so think fit, make an order that the evidence as to such facts and issues or any of them shall be taken vivâ voce at the hearing accordingly; and the facts and issues as to which any such order shall direct that the evidence shall be taken vivâ voce at the hearing shall be distinctly and concisely specified in such order. And where any such order shall have been made, the examination in chief, as well as the cross examination and re-examination, shall be taken before the Court at the hearing as to the facts and issues specified in such order; and no affidavit shall be admissible at the hearing in respect of any fact or issue which shall be included in any such order as aforesaid.

3. Except as to facts or issues included in any order directing evidence to be taken vivâ voce at the hearing under the first clause of this rule, each party shall be at liberty to verify his case by affidavit.

4. A Judge may, if he think fit, upon the application of either party, by summons served on the opposite party, order that any particular witness or witnesses shall be examined orally before an examiner specially appointed by the Judge for that purpose, whether the evidence of such witness or witnesses relate to any facts and issues specified in an order under the second clause of this rule, or not; and witnesses so examined shall be subject to cross examination and re-examination; and such examination, cross examination, and re-examination shall be conducted as nearly as may be in the mode now in use in Courts of common law with respect to a witness about

1866.

REGULÆ GENERALES.

to go abroad, and not expected to be present at the trial of a cause, but subject to such directions as may be given by the Judge in any particular case.

5. The evidence in chief on both sides in any cause taken before the hearing, to be used at the hearing (including the examination, cross examination, and re-examination of any witness before a special examiner, under any such order as mentioned in the last preceding clause of this rule), shall be closed within eight weeks after issue joined, unless the time is enlarged by special order; and no evidence subsequently taken shall be admissible without special leave of the Court or a Judge.

Consolidated Chancery Order, 5th February, 1861, Rule 5: Exch. Rules, 1860, 119.

6. All affidavits made in a cause, whether for the purpose of being used at the hearing or otherwise, shall be taken and expressed in the first person of the deponent, and all affidavits shall be filed in the Queen's Remembrancer's office; and affidavits to be used at the hearing of a cause shall be so filed before the time of closing evidence.

Consolidated Chancery Orders, XVIII. 1; and Exch. Rules, 1860, 121.

7. Every affidavit in a cause shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject.

15 & 16 Vict. c. 86, § 37.

8. No affidavit filed before issue joined in any cause shall, without special leave of the Court or a Judge, be received at the hearing thereof, unless within one month after issue joined notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf.

Consolidated Chancery Orders, XIX. 12.

9. Where any party has filed an affidavit intended to be used at the hearing of a cause, any opposite party desiring to cross examine the witness who has made such affidavit may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the witness for cross examination before the Court at the hearing, such notice to be served within fourteen days next after closing the evidence; but a Judge, on the application of the party filing such affidavit, by summons served on the opposite party, may, if the circumstances of the case in his opinion render it expedient, make an order giving the party filing such affidavit liberty to produce such witness for cross examination at a time named in such order, before an examiner specially appointed by the Judge, instead of at the hearing. Unless such witness is produced accordingly at the hearing, or, if such order as last aforesaid have been made, then at the time named in such order, such affidavit shall not be used as evidence without the leave of the Court. The party producing such witness shall be entitled to demand the expenses thereof in the first instance from the party requiring such production, but such expenses

Chancery Orders, 5th February, 1861, Rule 19.

1866.

REGULÆ GENERALES.

shall ultimtely be borne as the Court shall direct. The wit produced and cross examined, shall be subject to oral re-ex on behalf of the party by whom his affidavit was filed.

Chancery Orders, 5th February, 1861, Rule 20.

10. Where any such notice as is mentioned in the last clause is given, the party to whom it is given shall be compel the attendance of the witness for cross examinatic same way as he might compel the attendance of a witn examined on his behalf.

11. The attendance of a witness, whether before the C special examiner, may be compelled, either by an order of in the same manner as in Courts of common law, or by a ad testificandum, or subpœna duces tecum, which may be in mentioned at the foot of this rule, with such variations a stances may require.

15 & 16 Vict. c. 86, § 34.

12. When the examination or cross examination of witnes a special examiner shall have been concluded, the original de authenticated by the signature of the examiner, shall be tr by him to the Queen's Remembrancer's office, to be there fi

Chancery Order, 5th February, 1861, Rule 22.

13. Any party to a cause requiring the attendance of a before the Court for the purpose of being examined shall g opposite party forty-eight hours notice at least of his int examine such witness or person, such notice to contain the description of the person, unless the Court or a Judge sha case think fit to dispense with such notice.

15 & 16 Vict. c. 86, § 29.

14. Upon the hearing of any cause, the Court, if it shall do so, may require the production and oral examination be of any witness or party in the cause, and may direct the cos attending the production and examination of such witness o be paid in such manner as it may think fit.

Ib. 41.

15. In cases where it shall be necessary for any party t evidence subsequently to the hearing of a cause, such evid be taken by affidavit, but subject to any special directions w be given by the Court or a Judge in any particular case.

Chancery Order, 6th March, 1800.

16. Affidavits to be filed in the office of the Queen's Remem whether for the purpose of being used on an interlocutory ap or at the hearing of a cause, or otherwise, are to be written cap paper bookwise: Provided nevertheless, that the Qu membrancer may receive and file affidavits written otherwis here directed, if in his opinion the circumstances of the cas such reception and filing desirable or necessary.

15 & 16 Vict. c. 86. s. 59.

17. Upon applications by motion to the Court in any suit d therein for an injunction, or to dissolve an injunction, the

the defendant shall, for the purpose of evidence on such motions, be regarded merely as an affidavit of the defendant, and affidavits may be received and read in opposition thereto.

Form of Subpœna referred to in Clause 11 *of the preceding Rule.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. We command you [and every of you], That, all excuses ceasing, you do personally be and appear before [our trusty and well-beloved The Barons of our Court of Exchequer at Westminster, at such times as the bearer hereof shall by notice in writing appoint], [*or* an examiner specially appointed for the examination of witnesses in our Exchequer, at such times and places as the bearer hereof shall by notice in writing appoint], to testify the truth according to your knowledge in a certain cause depending in our said Court of Exchequer, wherein is informant [and plaintiff, *or* and and others are plaintiffs], and and others [*or* another] is [*or* are] defendant [*or* defendants] on the part of the [and that you then and there bring with you and produce], and hereof fail not at your peril.

Witness, &c.

RULE XI.

Setting down for Hearing.

1. Within eight weeks after the evidence has been closed, the informant is to set down the cause, and obtain and serve on the solicitor of the defendant, or upon the defendant if defending in person, a subpœna to hear judgment. If he does not, any defendant, after the expiration of such eight weeks, may set the cause down, and may obtain a subpœna to hear judgment, and serve the same on the solicitor of the informant, and on the other defendants, if any. Consolidated Chancery Orders, XXI. 1.

2. A subpœna to hear judgment must be served at least ten days before the return thereof. Ib. XXI. 5.

3. A subpœna to hear judgment shall be in the form next hereinafter set forth, with such variations as circumstances may require.

Subpœna to hear Judgment.

VICTORIA, by the Grace of God of the United Kingdom of Great

1866.

REGULÆ GENERALES.

Britain and Ireland Queen, Defender of the Faith: To greeting. We command you [and every of you] that you appear before the Chancellor and Barons of our Exchequer at Westminster on the day of or whenever thereafter a certain cause now depending in our Court of Exchequer at Westminster, wherein is informant [and plaintiff], and is defendant [*or*, are defendants], shall come on for hearing, then and there to receive and abide by such judgment and decree as shall then or thereafter be pronounced, upon pain of judgment being pronounced against you by default.

Witness at Westminster the day of , in the year of our Lord one thousand eight hundred and sixty .

RULE XII.

Decrees, Rules, and Orders.

Consolidated Chancery Orders, XXIII. 2.

1. It shall not be necessary in drawing up any decree to recite any of the pleadings or any previous proceeding beyond the prayer of the information, but it shall be sufficient to refer thereto; save only that in cases involving special circumstances, as the Court or a Judge shall direct, or the Queen's Remembrancer shall in his discretion think fit, such short recitals may be inserted as may be necessary to shew the grounds on which the decree is granted.

Rules of 26th November, 1861.

2. All rules at side bar, and orders on motion of course, shall bear date on the day they are drawn up.

Rule of 22nd June, 1860.

3. All rules upon the sheriffs of London or Middlesex to return writs shall be four-day rules, and upon other sheriffs eight-day rules.

Rule 114.

4. The writ heretofore used calling upon a party to perform a rule, order, or decree shall not be necessary or used to bring such party into contempt, but the serving of a copy of the rule, order, or decree, or the copy of an office copy of such rule, order, or decree, shall be deemed sufficient service.

Rule 113.

5. It shall not, except in cases of attachment, be necessary to the regular service of a rule, order, or decree that the original or office copy thereof should be shewn, unless sight thereof be demanded.

RULE XIII.

Revivor and Supplement.

1. Where an order under the Crown Suits, &c. Act, 1865, to the

effect of an order to revive or of a supplemental decree has been obtained, the first seven clauses of the second of these rules shall be applicable, in the same manner as if such order were an information filed on the day on which such order is obtained, and to which the persons who would be defendants to an information of revivor or supplemental information were defendants.

2. Any person under no disability, or under the disability of coverture only, who may be served with any such order as mentioned in the last preceding clause, may apply to the Court or a Judge to discharge such order within twelve days after such service. Consolidated Chancery Orders, XXXII. 1.

3. Any person under any disability other than coverture, who may be served with any such order as last aforesaid, may apply to the Court or a Judge to discharge such order within twelve days after the appointment of a guardian or guardians ad litem for such person, and until such period of twelve days shall have expired such order shall be of no effect as against such person. Ib.

4. Where the informant in any cause which is not in such a state as to allow of an amendment being made in the information, desires to state or put in issue any facts or circumstances which may have occurred after the institution of the suit, he may state the same, and put the same in issue, by filing in the Queen's Remembrancer's Office a statement, either written or printed, to be annexed to the information, and such proceedings by way of answer, evidence, and otherwise shall be had and taken upon the statement so filed, as if the same were embodied in a supplemental information. Consolidated Chancery Orders, XXXII. 2.

RULE XIV.

Written Pleadings, &c.

Pleas, demurrers, interrogatories, traversing notes, replications, supplemental statements, exceptions, and certificates, to be filed in the office of the Queen's Remembrancer, are to be written on paper of the same description and size as that on which informations are printed. Chancery Order, 6th March, 1860.

RULE XV.

Computation of Time.

1. In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Court, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen Revenue side rule, 61.

1866.
REGULÆ GENERALES.
Rule 62.

to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

2. Christmas-day and the three following days, and the days between the Thursday next before and the Wednesday next after Easter-day, shall not be reckoned or included in the time allowed for any proceeding.

3. The period from the 10th day of August to the 24th day of October (both inclusive), shall be excluded in reckoning the time allowed for pleading, answering, or demurring to an information, and for filing exceptions to answers.

RULE XVI.

Payment of Money into Court.

Exchequer rules of 1860, 132, 133, 134.

1. Any party directed by any decree or order of the Court or a Judge to pay money into Court, must apply at the office of the Queen's Remembrancer for a "direction" so to do, which direction must be taken to the Bank of England, and the money there paid in. After payment, the receipt obtained from the Bank of England must be filed at the Queen's Remembrancer's office.

2. If the money is to be invested, paid out, or otherwise disposed of, an order of the Court or of a Judge must be obtained for that purpose, upon notice to the opposite party.

3. The orders relating to the matters mentioned in this rule are to be drawn up in the Queen's Remembrancer's office.

RULE XVII.

Recognizances.

Exchequer rules of 1860, 68, 71, 72.

1. All recognizances, if taken and acknowledged in town, are to be taken and acknowledged before a Judge; and if a recognizance be taken and acknowledged in the country, the same may be taken and acknowledged before a Commissioner for taking special bail in the Exchequer, and in the latter case an affidavit of caption must be made and filed.

2. No inrolment of any recognizances shall be necessary, but the same shall be filed in the Queen's Remembrancer's office.

3. All recognizances are to be prepared on parchment by the respective parties entering into the same.

1866.

REGULÆ GENERALES.

RULE XVIII.

Issuing Writs.

1. All writs in suits shall be prepared by the solicitor of the department, or by the solicitor suing out the same, and the name of the solicitor of the department together with the name of the department, or the name and address of such other solicitor, shall be indorsed on such writ; and every such writ shall, before the issuing thereof, be sealed at the Queen's Remembrancer's office, and a præcipe thereof left at the said office; and thereupon an entry of every such writ, together with the date of sealing and the name of the solicitor suing out the same shall be made in a book to be kept at the Queen's Remembrancer's office for that purpose; and all such writs shall be tested of the day, month and year when issued, and conclude without any other words.

Rules of revenue side, 1860.

RULE XIX.

Distringas.

A writ of distringas on behalf of Her Majesty's Attorney General, or of the Attorney General of the Prince of Wales and Duke of Cornwall, to restrain the transfer of stock transferable at the Bank of England, or the payment of the dividends thereon, shall continue to be issuable from the office of the Queen's Remembrancer in the form heretofore made, but concluding with the date of the day, month and year of issue only.

RULE XX.

Power of Court as to Time.

Any power which the Court or a Judge may now possess to enlarge or abridge the time for doing any act or taking any proceeding, upon such (if any) terms as the justice of the case may require, shall not be affected by these orders.

RULE XXI.

Costs.

1. Solicitors shall be entitled to charge and be allowed the fees set forth in the Schedule hereto, unless the Court shall make order to the contrary as to all or any of the parties.

2. Where costs are to be taxed, one day's notice of taxing costs, together with a copy of the bill of costs, shall be given to the solicitor of the party whose costs are to be taxed, by the other party or his solicitor.

Exchequer rules of 1860, 81, 82, 26.

1866.
REGULÆ GENERALES.

3. Where costs are directed to be paid to the Crown, a certificate shall be granted by the Queen's Remembrancer of the costs allowed, and on default of payment the solicitor of the department may sue out a subpœna for the payment of such costs, and on an affidavit of service thereof, and demand made, and nonpayment, an attachment may be granted.

4. A subpœna for costs shall be in the form set forth at the foot of this rule, with such variations as circumstances may require.

Subpœna for Costs.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To
greeting. We command you [and every of you], That you pay or cause to be paid immediately after the service of this writ to
or the bearer of these presents £ costs in a cause wherein
is informant [and plaintiff] and
[and another *or* other] is defendant [*or*, are defendants], by our Court of Exchequer adjudged to be paid by you the said
under pain of an attachment issuing against your person and such process for contempt as the said Court shall award in default of such payment.

Witness, &c.

RULE XXII.

Appointments.

22nd June, 1860. Rule 139.

On every appointment made by the Queen's Remembrancer, the party on whom the same shall be served shall attend without waiting for a second appointment, or in default thereof the Queen's Remembrancer may proceed ex parte on the first appointment.

RULE XXIII.

Commencement of Rules.

These rules shall take effect and come into operation on the 16th day of April, 1866, but nothing therein contained shall apply to any suit commenced by information filed before that day, unless the Court or a Judge shall on hearing the parties so direct.

RULE XXIV.

Interpretation.

1. In the preceding rules the following words (that is to say,) "the

Court," "information," "suit," and "cause," have the meanings mentioned in "The Crown Suits, &c., Act, 1865," sect. 6; and the term "a Judge" means any Judge of one of Her Majesty's Superior Courts of Law at Westminster transacting business out of Court.

2. In the preceding rules the following words have the several meanings hereby assigned to them over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction; (that is to say,)

(1.) Words importing the singular number include the plural number, and words importing the plural number include the singular number:

(2.) Words importing the masculine gender include females:

(3.) The word "party" or "parties" includes a body politic or corporate, and also includes Her Majesty's Attorney General, or the Attorney General of the Prince of Wales and Duke of Cornwall, as the case may require.

(4.) The word "affidavit" includes affirmation.

FRED. POLLOCK.
G. BRAMWELL.
SAMUEL MARTIN.
W. F. CHANNELL.
G. PIGOTT.

March 14*th*, 1866.

SCHEDULE.

FEES AND CHARGES TO BE ALLOWED TO SOLICITORS.

INSTRUCTIONS.

	£	s.	d.
For special cases, answers, examinations, demurrers, pleas and exceptions	0	13	4
For informations	2	2	0
For amended or supplemental information	0	13	4
For brief for moving for injunction	1	1	0
For interrogatories for examination of parties or witnesses	0	13	4
For special petitions	0	13	4
For special affidavits	0	6	8
For brief in suit by information on cause coming on for hearing on service of subpœna to hear judgment	1	1	0

1866.

REGULÆ GENERALES.

	£	s.
To defend proceedings commenced by information	0	13
For instructions for order to revive or add parties	0	13

As to informations and answers, affidavits and petitions, in lieu of the fixed fees for instructions for and for drawing, the Queen's Remembrancer is to be at liberty to take into his consideration the special circumstances of each case, and at his discretion to make such further allowance as shall appear to him to be just.

THE PREPARATION OF PLEADINGS AND OTHER DOCUMENTS.

(The folio to be seventy-two words and the sheet ten folios.)

For drawing informations, answers, pleas, demurrers, exceptions, interrogatories, and affidavits, per folio	0	1
For engrossing, per folio	0	0
For drawing statements and other documents for the Judges' Chambers or Queen's Remembrancer, when required, including the fair copy thereof to leave in Chambers, per folio	0	1
For examining and correcting the proof of an information or answer, per folio	0	0
For revising the print of an answer before swearing or filing, per folio	0	0
For drawing special notice of motion	0	5
Or, per folio	0	1
For drawing such observations for counsel to accompany brief as may be necessary and proper, per sheet	0	6
For drawing the brief on further consideration, per sheet	0	6
For preparing and filing replication	0	10
For drawing statement on which counsel to move for order to revive or add parties, and copy	0	10
Or, according to circumstances, at per sheet	0	6
For drawing petition to revive, at per folio	0	1
For drawing and copying certificate to appoint guardians ad litem	0	6
For amending each copy of an information to serve where no reprint	0	13
For amending each brief information where no reprint	0	13
For drawing bills of costs, including the copy for the Queen's Remembrancer's office, per folio	0	0

The fee for drawing a document in all cases includes a copy, if required, for the use of the solicitor or client, or for the settlement of counsel.

1866.

REGULÆ GENERALES.

	£	s.	d.
PERUSALS.			
using the print of an information by the defendant's ors	1	1	0
ding sixty folios, at per folio . . .	0	0	4
using the print of an amended information .	0	13	4
dments exceeding forty folios, at per folio .	0	0	4
using an amended information when amended in g	0	6	8
dments exceeding twenty folios, at per folio .	0	0	4
icitor of the party answering interrogatories, for ing interrogatories	0	13	4
ding forty folios, at per folio . . .	0	0	4
using an answer	0	13	4
ding forty folios, at per folio . . .	0	0	4
using an examination, at per folio . . .	0	0	4
using all special affidavits filed by an opposing , at per folio	0	0	4
using copy supplemental statement under Crown Act	0	13	4
using copy order to revive	0	13	4
COPIES.			
to the foregoing regulations as to charges for copies, of all documents are to be at the rate of per	0	0	4
heet of ten folios at	0	3	4
ring regard to the preceding fees for perusal, the e for abbreviating is to cease; and no close copies re now to be allowed as of course, but the allowance is to depend on the propriety of making the opy, which in each case is to be shewn and considered.			
copy of a summons to serve . . .	0	2	0
copy of a notice of motion, order, or certificate ve	0	1	0
r folio	0	0	4
ATTENDANCES.			
nding on the Queen's Remembrancer's Warrant .	0	6	8
rding to the circumstances, not to exceed per diem	2	2	0
nding each counsel with his brief, case, or abstract, uit or other proceeding in this Court . .	0	6	8

1866.

REGULÆ GENERALES.

	£	s.	d.
For the like, where the fee amounts to five guineas	0	13	4
Where it amounts to twenty guineas	1	1	0
Where it amounts to forty guineas or upwards	2	2	0
For attending to present special petition, and for same answered	0	6	8
For attendance on counsel and Court on motion of course, and for order	0	13	4
For attending on the day in which a cause or petition stands appointed for hearing, or for which notice of motion has been given	0	10	0
For attending when heard	1	1	0
Or according to circumstances, not to exceed per diem	2	2	0
For attending the Court on every special motion, when made	0	13	4
Or according to circumstances, not to exceed	1	1	0
For attending on motion for or to discharge order for injunction or other matter, when heard per diem	0	13	4
Or according to circumstances, not to exceed	1	1	0
For attending to get answer or special affidavit sworn	0	6	8
For attending examiner to procure appointment to examine witnesses	0	6	8
For attending the examination of witnesses before examiner	0	13	4
Or according to circumstances not to exceed per diem	2	2	0
But if without counsel the fee may, at the Queen's Remembrancer's discretion, be increased to	3	3	0
For attending to settle afterwards to read over the engrossment of an answer or examination	0	13	4
If the same exceed twenty folios and under fifty folios	1	1	0
And for each additional thirty folios	0	6	8
For attending to insert an advertisement in Gazette	0	6	8
For entering caveat with the Queen's Remembrancer	0	6	8
For attending to procure certificate of a caveat	0	6	
For attending Queen's Remembrancer to certify abatement or settlement of suit, and to have same so marked in the cause book	0	6	
For attending the printer with an information or answer to be printed	0	6	
For attending to get copies of information or interrogatories marked for service	0	6	
For attending to take instructions to appear, and to enter the appearance of one or more defendants, not exceeding three	0	6	

	£	s.	d.
If exceeding three, for every additional number not exceeding three	0	6	8
The solicitor of the party filing an answer, for his attendance on the Queen's Remembrancer with and for the written and printed copies of an answer, and for certifying	0	13	4
For the informant, or party having the conduct of the order, attending the Queen's Remembrancer with briefs and papers, to bespeak minutes or order, not being an order of course	0	6	8
For ditto, for preparing list of evidence read, but only when required by the Queen's Remembrancer, and certified by him	0	6	8
Or according to length at per folio	0	1	0
Attending to settle the draft of any decree or order	0	13	4
Or at the Queen's Remembrancer's discretion, not to exceed	2	2	0
In case the Queen's Remembrancer shall certify that a special allowance ought to be made in respect of any unusual difficulty in settling an order, he is to consider the same, and make such allowance to all or any of the parties as to him shall seem just.			
For attending to procure certificate of pleadings	0	6	8
For attending to give consent to take answer without oath, and for other necessary or proper consent, of a like nature	0	6	8
For attending to procure such consents	0	6	8
For attendances in consultation or in conference with counsel	0	13	4
For attending Court on appointment of a guardian ad litem	0	13	4
WRITS.			
For every writ of subpœna duces tecum	0	6	8
For a writ or writs of subpœna other than subpœna duces tecum, if the number of names therein shall not exceed three	0	6	8
If exceeding three names, for every additional number not exceeding three	0	6	8
For preparing every other writing without order	0	6	8
For every writ under order except special injunction	0	13	4
For special injunction including engrossment	1	0	0
Or per folio	0	1	0

1866.

REGULÆ GENERALES.

NOTICES AND SERVICES.

	£	s.	d.
For service of a notice of motion, exclusive of copy	0	2	6
For notice to a solicitor of appearance, answer, demurrer, plea, amendment, and replication	0	2	6
For notice of filing affidavits or set of affidavits filed, or which ought properly to have been filed together, to be read in Court	0	2	6
For notice of appointment or copy warrant for settling and passing decrees or orders before the Queen's Remembrancer			
For copy and service of a warrant on a solicitor	0	2	6
For service of a Judge's summons, exclusive of the copy	0	2	6
For service of a petition	0	2	6
For Judge's summons, copy and service	0	5	0
For service of an order, exclusive of the copy	0	2	6
For other necessary or proper notice	0	2	6

For services on a party or witness such reasonable charges and expenses as may be properly incurred, according to distance, or by the employment of an agent.

OATHS AND EXHIBITS.

To the Commissioner for oath in London according to statute	0	1	6
In the country	0	2	6
To the solicitor, for preparing each exhibit in town and country	0	1	0
The Commissioner, for making each exhibit	0	1	0

TERM FEE.

For a term fee, in all causes, for every term in which a proceeding by the party shall take place	0	10	0
And for letters, per term	0	5	0
In country agency causes the further fee for letters of	0	6	8

Where no proceeding is taken which carries a term fee, a charge for letters may be allowed, if the circumstances shall require it.

For any work or labour properly performed, and not herein provided for, such allowances are to be made as heretofore.

1866.

BLUMBERG and Others *v.* ROSE and Another. *April* 23.

A composition deed under the 192nd section of the Bankruptcy Act, 1861, made between the debtor of the first part, a trustee of the second part, and the creditors named in the schedule of the third part: after reciting that the debtor proposed to pay all his creditors a composition by giving them promissory notes; and that such promissory notes had been deposited with the trustee to deliver to the non-executing and non-assenting creditors, witnessed that, in consideration of the premises, each of the creditors who executed, or assented to, or were bound by, the deed, released the debtor.—*Held*, that the deed was not bad on the ground of inequality among the creditors, by reason of its containing no provision making it obligatory on the trustee to tender the promissory notes, or give notice of the deed to non-assenting creditors.

DECLARATION on a bill of exchange accepted by defendants, &c.

Plea.—That after the accruing of the causes of action the declaration mentioned, the defendants being indebted to the plaintiffs in respect thereof, and also indebted divers other persons respectively in divers monies, a deed was made, &c., to the tenor following:—

This indenture, made the 30th day of August, 1865, between George Rose and James Rose, both of, &c., fancy dealers, hereinafter styled "debtors," of the first part; Samuel Davis, of, &c., hereinafter styled the trustee, of the second part; and the several persons whose names or firms are set forth in the schedule hereto, hereinafter styled "creditors," of the third part. Whereas the said debtors being unable to meet their engagements with their creditors, have proposed to pay them a composition of 12*s.* 6*d.* in the pound by giving them respectively three joint and several promissory notes payable at six, nine, and twelve months from the date hereof, signed by the said George Rose, James Rose, Felix Rose, of, &c., and Frederick Rose, of, &c., respectively, which said several promissory notes the said creditors have agreed to take in full satisfaction and discharge of their respective debts. And whereas the said composition of 12*s.* 6*d.* in the pound to be secured by the

1866.
BLUMBERG v. ROSE.

said promissory notes is payable to creditors who have not executed or assented to these presents. And such promissory notes have been deposited with the said trustee to be held by him in trust to deliver the same respectively to such last mentioned creditors respectively on demand, as the said trustee doth hereby acknowledge. Now this indenture witnesseth, that in consideration of the premises each of the said creditors of the said debtors who shall have executed or otherwise assented to, or who shall be bound by these presents, for himself and his partners and his and their respective heirs, executors and administrators, and so far only as may be done without prejudice to any security or suretyship, or any rights or remedies against any person other than the said debtors, do and each of them doth hereby acquit, release and discharge the said debtors and each of them, their and each of their heirs, executors and administrators, and their and each of their estate and effects, from all and every debts and debt and sums and sum of money due and owing by the said debtors to such creditors respectively, either alone or jointly with any partner or partners aforesaid, of and from all judgments, executions, actions, suits, claims and demands whatsoever on account thereof in anywise. Provided always that nothing herein contained shall discharge or prejudice any lien or security or any suretyship held by any of the said creditors, and that the creditors who shall have executed or otherwise assented to, or who shall be bound by these presents, shall retain all their rights and remedies against any person other than the said debtors as if these presents had never been executed. And it is hereby declared that these presents are intended to operate as a composition deed, or a deed of arrangement executed by a debtor within the 192nd section of the Bankruptcy Act, 1861, and that all questions relating to the same or any of the premises shall be decided and determined according to the provisions of

that Act, with respect to composition deeds executed by a debtor in conformity with that section, and that these presents shall enure for the benefit of, and be effectual against and binding in all respects upon all now existing creditors of the said debtors, and that if there is anything herein not authorized by the provisions of the said Act to be introduced into a composition deed executed by a debtor in conformity with the said section, such unauthorized thing shall be considered as expunged as if it had never been inserted herein. In witness whereof the said parties hereto have hereunto set their hands and seals, each creditor signing, sealing and delivering the same in the presence of the person whose name is affixed as the witness to such execution in the last column of the said schedule hereunto. And a majority in number representing three-fourths in value of the creditors of the defendants, whose debts respectively amounted to 10*l.* and upwards, did in writing assent to and approve of the said deed, and the said trustee appointed by the said deed executed the same, and the execution of the said deed by the defendants was attested by a solicitor, and within twenty-eight days from the execution of the said deed by the defendants the same was produced and left (having been first duly stamped) at the office of the Chief Registrar of the Court of Bankruptcy for the purpose of being registered, and together with such deed there was delivered to the said Chief Registrar an affidavit by the defendants as required by the "Bankruptcy Act, 1861," in that behalf, and the said deed did before the registration thereof bear such ordinary and ad valorem stamp duties as were provided by the said Bankruptcy Act, 1861, in that behalf, and at the time of the execution of the said deed the plaintiffs were creditors of the defendants in respect of the debt in the declaration mentioned and claim herein pleaded to, within the meaning of the said Bankruptcy Act, and all conditions having been performed and all things

1866.
BLUMBERG v. ROSE.

having happened necessary in that behalf, the plaintiffs became and were and are bound by the said deed as if they had been parties thereto, and had duly executed the same. And the said defendants say that the said promissory notes so to be made for the payments to the plaintiffs of the amount of the said composition of 12*s.* 6*d.* in the pound, upon, for and in respect of the said debts, were made in due time, and were deposited with the said trustee for the purpose in the said deed in that behalf, and all conditions have been performed, and all things have been done and exist, to make the said deed operate as a valid and effectual release of the said debt of the plaintiffs.

Holl, in support of the demurrer.—The deed is not binding on non-assenting creditors, inasmuch as they are not in the same position as scheduled creditors. There is an inequality in this respect, that the deed contains an absolute release by the creditors who have executed or assented to or are bound by it; but as regards the scheduled creditors, the release would only operate when they executed or assented to the deed, and then the promissory notes would be delivered to them. They would therefore have a right of action against the debtor upon the notes, whereas the non-scheduled creditors would merely have their notes deposited in the hands of the trustee, who is under no obligation to tender them the notes, or even to give them notice that the notes have been deposited for their benefit. A debtor is bound to take reasonable care that provision is made for payment of all his creditors, whether assenting or non-assenting. The deed should have made it obligatory on the trustee to tender the notes to the non-assenting creditors. [*Bramwell,* B.—Does the rule as to inequality apply where the debtor has done the best he could for all his creditors? : *Scott* v. *Berry* (*a*).] It

(*a*) 3 H. & C. 966.

is consistent with these pleadings that the non-assenting creditors never heard of the deed.

Joyce appeared to support the plea, but was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the plea is good. It appears to me that the inequality complained of is not that kind of inequality which the statute contemplated. Where there are two sets of creditors in a position so different, the one having assented and the other not having assented, and perhaps in entire ignorance of the deed, it is impossible that there should not be a certain degree of practical inequality. But complaint might as well be made that some of the creditors reside at a distance, and that a different arrangement would be more convenient to them. It seems to me that this arrangement, which is in principle equal, affords no objection to the deed, and that it is a good answer to the action.

MARTIN, B.—I am of the same opinion. This inequality is necessarily incident to the case where a non-assenting creditor is compelled to be bound by a majority of assenting creditors. It is not possible to avoid it; and there is not a word in the act of parliament requiring that to be done which the plaintiffs' counsel has insisted on.

BRAMWELL, B.—That is my difficulty with respect to the argument for the plaintiff. A non-assenting creditor may never have had an opportunity of concurring, because he may never have heard of the deed; and no doubt that is in one sense an inequality. But that is not the kind of inequality which the statute has contemplated; for it does not require that non-assenting creditors should have notice of the deed. If a debtor obtains the assent of the requisite

1866.
BLUMBERG v. ROSE.

proportion in number and value of creditors, he need say nothing about it. It is contended, on the part of the plaintiffs, that the debtor ought to give notice of the deed to all his creditors, but if we were to hold this deed bad because notice of it was not given to a non-assenting creditor we should be indirectly compelling a debtor to do that which the statute has not required him to do. It seems to me that this is a good deed, and not unequal. It may be that the alleged debt was disputed by the debtor.

PIGOTT, B.—I also think that this is a good deed under the 192nd section of the Bankruptcy Act, 1861, and that the inequality complained of is only that kind of inequality which is inherent in deeds of this nature. If a creditor resides at Liverpool he may sustain some inconvenience which does not affect a creditor who resides in London.

Judgment for the defendants.

PEARSON v. PEARSON (a).

A deed registered under the 194th section of the Bankruptcy Act, 1861, in order to operate under the 197th section must be registered with all the formalities required by the 192nd section.

DECLARATION for money received by the defendant for the use of the plaintiff.

Plea.—That after the accruing of the plaintiff's claim, and after the 11th day of October, 1861, the plaintiff was indebted to divers persons and thereupon a deed, bearing date the 24th day of October, 1865, was made and entered into by and between the plaintiff of the one part, and R. Wright and R. Easton, as and being trustees on behalf of the thereunder signed creditors of the plaintiff, of the other part,

(a) Decided in Trinity Term (May 30), but inserted here as relating to the same subject as the previous case.

relating to the debts and liabilities of the plaintiff and his release therefrom. And the plaintiff thereby conveyed all his estate and effects to the said R. Wright and R. Easton absolutely, as trustees, to be by them applied and administered for the benefit of the creditors of the plaintiff in like manner as if the plaintiff had been at the date thereof, duly adjudged bankrupt. And all things necessary in that behalf having happened and been done to render the said deed binding on the creditors of the plaintiff under the Bankruptcy Act, 1861, and to vest the debts and causes of action in the declaration mentioned in the said trustees, the said debts and causes of action became and were and are vested in the said R. Wright and R. Easton as such trustees for the benefit of the plaintiff's creditors as aforesaid.

Replication.—That the said deed was registered under and by virtue of the 194th section of the Bankruptcy Act, 1861, and the same was not under and according to the 192nd section of the said Act, within twenty-eight days from the day of the execution of the said deed produced and left (having been first duly stamped) at the office of the Chief Registrar of the Court of Bankruptcy for the purpose of being registered, and together with such deed there was not delivered to the said Chief Registrar an affidavit by the plaintiff, or some person able to dispose thereto, or a certificate by the said trustees or either of them, that a majority in number representing three-fourths in value of the creditors of the plaintiff whose debts amounted to 10*l.* and upwards had in writing assented to and approved of the said deed, and stating the amount in value of the property and credits of the plaintiff comprised in such deed.

Demurrer, and joinder therein.

Dowdeswell, in support of the demurrer.—The question is,

1866.
PEARSON v. PEARSON.

whether a deed registered under the 194th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), in order to operate under the 197th section, must be registered with all the formalities required by the 192nd section. In order to vest the debtor's estate in the trustees, and bring the deed within the 197th section, it need only be registered under the 194th section. [*Martin*, B.—The 197th section says that "from and after the registration of every such deed or instrument *in manner aforesaid*" certain rights and liabilities shall attach, then how can it operate before registration in that manner?] Section 192 relates to trust deeds, composition and inspectorship deeds. Section 194 relates to deeds by which a debtor assigns all his estate and effects to trustees for the benefit of his creditors. At common law the execution of such a deed was an act of bankruptcy; but the 68th section of the Bankruptcy Law Consolidation Act, 1849, declares that it shall not be deemed an act of bankruptcy unless a petition for adjudication in bankruptcy be filed within three months, provided (amongst other things) that notice of the deed be given in certain newspapers. The 194th section of the Bankruptcy Act, 1861, was intended to comprise every deed by which a debtor made an arrangement with his creditors, whether there were parties assenting or not, and upon the registration of such deed the 197th section places the parties affected by it in the same position as if the debtor had been adjudged bankrupt. [*Bramwell*, B.—Does the 198th section apply to deeds under the 194th?] It is conceded that it does not. [*Channell*, B., referred to *Symons* v. *George* (*a*).] There *Pollock*, C. B., *Bramwell*, B., and *Pigott*, B., expressed an opinion that deeds under the 194th section were, when registered, subject to the jurisdiction of the Court of Bankruptcy. This point was raised before Lord *Westbury*, C.,

(*a*) 3 H. & C. 68; in error, id. 996.

in the case of *Ex parte Alexander* (*a*), but not decided. [*Martin*, B.—In *Ex parte Spyer* (*b*) Lord *Westbury*, C., said:—"There is, undoubtedly, some obscurity in the antecedent enactments of section 192, arising in a great degree from amendments and alterations that were made in the language of the original bill; but nevertheless it is clear that the operation and effect of a trust deed duly registered in conformity with the 192nd section are defined with accuracy by the 197th section. If a deed has been duly and completely registered under the 192nd section, that deed has the full operation and effect attributed to it by the 197th section; and it subjects the whole estate and effects of the debtor to be applied for the benefit of his creditors, and the rights of the creditors are defined by, and must be collected from, the 197th section."] There the question was as to the operation of a trust deed registered under the 192nd section. *Ex parte Morgan* (*c*) only decided that a trust deed for the benefit of creditors is no protection against proceedings in bankruptcy unless it is registered in conformity with the provisions of the 192nd section. [*Martin*, B.—At common law the assignee of a debt cannot sue for it in his own name, and we ought not, without clear and express words, to put upon the statute the construction contended for.]

E. L. O'Malley appeared to support the replication, but was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the plaintiff is entitled to judgment. The question is, whether the 197th section of the Bankruptcy Act, 1861, applies to deeds registered under the 194th section, but not in con-

(*a*) 32 L. J. Bank. 55. (*b*) 32 L. J. Bank. 62.
(*c*) 1 De Gex, J. & S. 288.

1866.
PEARSON v. PEARSON.

formity with the requisites of the 192nd section. The 197th section says that "from and *after the registration of every such deed or instrument in manner aforesaid*, the debtor and creditors, and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor, be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this Act in the same or like manner as if the debtor had been adjudged a bankrupt." That raises the question whether the 194th section is not in the nature of a provision casually interposed and to be considered as parenthetical only (which was the view of Lord *Westbury*, C., in *Ex parte Morgan* (*a*)), or whether it is to be considered as embodying with it the provisions of the 197th section; so that when a trust deed is registered under the 194th section, the 197th section applies to it, and transfers to the trustees, in the same manner as if they were assignees in bankruptcy, the debts and causes of action of the debtor, so as to enable the trustees to sue for them in their own names.

Looking at the scope of the Act, it appears to me that the latter is not the true construction of it. I agree with my brother *Martin*, that, having regard to the common law of the land, we ought not, without clear and express words, so to construe the Act as to make a deed of this sort assign to the trustees the right to sue in their own names for the debts of the assignor. It appears to me that the 194th section is really parenthetical, and that the construction put upon the Act by Lord *Westbury*, C., in the case of *Ex parte Morgan* is the true construction. For these reasons I am of opinion that the plaintiff is entitled to judgment.

MARTIN, B.—I am of the same opinion. As I have had

(*a*) 1 De Gex, J. & S. 288.

occasion to observe before, I again say that I have never pronounced a judgment upon the arrangement clauses of this Act which is satisfactory to my mind. It is to be hoped that in any future Bankruptcy Act the clauses will be so framed as to enable us to give a satisfactory judgment upon them, and not a judgment founded upon mere surmise and remote inferences drawn, as it seems to me, from very slight premises.

In my opinion the 194th section is in the nature of a parenthesis. I cannot think it was the intention of the legislature that, upon a debtor executing a deed of this kind, and perhaps keeping it in his pocket (as is remarked, I think, by Lord *Westbury*, C.), it should operate, without the concurrence of a single creditor, to transfer the whole of the debtor's estate and effects, including debts, to the trustees, so as to enable them to sue for debts in their own names. I think that the judgment of Lord *Westbury*, C., in the case of *Ex parte Smith* (*a*), which was an appeal against a decision of mine at Chambers, concludes this case. There the question arose under the 198th section of the Bankruptcy Act, 1861, which provides that "after *notice* of the filing and *registration of such deed* has been given as aforesaid," no execution against the debtor's property or person shall be available to any creditor. The deed conveyed all the debtor's estate and effects to trustees for the benefit of his creditors, and it had been registered. I decided at Chambers that it was not a valid deed under the 192nd section; and that, inasmuch as a deed under the 194th section need not have the notice of registration required by the 198th section, that section only applied to deeds registered with all the formalities required by the 192nd section. The 197th section commences with the words "from and after the registration of *every such deed* or

(*a*) 10 L. T. N. S. 551.

1866.
PEARSON v. PEARSON.

instrument in manner aforesaid;" but I think that does not mean deeds registered under the 194th section, but deeds registered with all the formalities required by the 192nd section; and so far as I can judge from the expressions of Lord *Westbury*, C., in the case to which I have referred, that was his opinion.

BRAMWELL, B.—I am of the same opinion. No doubt the words in the 197th section "every such deed" presumably mean every such deed as is previously mentioned, including deeds both under the 192nd and 194th sections; but I think we must read the 197th section as if it contained the limitation of "every such deed as first aforesaid," or "as mentioned in the 192nd section aforesaid." There is good reason for such an interpolation, for if Mr. *Dowdeswell's* contention is right, it is manifest that the extraordinary consequence would follow which my brother *Martin* has pointed out, viz., that a debtor might execute an assignment of all his estate and effects to trustees appointed by himself, although not one of his creditors assented or even knew of it.

Now the 198th section says that "after notice of the filing and registration of such deed has been given as aforesaid," and Mr. *Dowdeswell* admitted that the 198th section does not include deeds under the 194th section. Therefore we are compelled to interpolate in the 198th section such words as I have suggested, in order to make the limitation which is admitted; and if the interpolation be made in the 198th section, there is no reason why it should not also be made in the 197th.

In addition, the 197th section speaks of parties bound by the deed. Mr. *Dowdeswell* has ingeniously suggested that may mean "every such deed or instrument, as well where parties assenting are bound by it as where there are no such parties." I cannot say it might not have that meaning

if all other reasons concurred to enable me to put that construction upon it; but, instead of that, the reasons are the other way. If it has the meaning for which Mr. *Dowdeswell* contends, it is not correctly expressed. It would have been more accurate to have said: "From and after the registration of every such deed or instrument in manner aforesaid, as well where the parties have not executed or assented thereto or are bound thereby as where they have executed or assented thereto and are bound thereby, the debtor and creditors, and trustees parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy." As it stands there is an inaccuracy, undoubtedly an uncertainty, in the mode of expression, and we are at liberty to infer from it that all these things are predicated, viz., that it is a deed to which some creditors are parties, that some creditors have assented thereto, and some are bound thereby. Upon the whole it seems to me necessary to add words to the 198th section, and if so, to the 197th, so as to read it as if it were "every such deed or instrument as in the 192nd section mentioned."

CHANNELL, B.—I concur in opinion that our judgment ought to be for the plaintiff.

Apart from the Bankruptcy Act, 1861, no such effect can be given to an assignment of a debt or chose in action as to transfer to the assignee the right to sue for it in his own name. The defence set up by the plea is that by operation of that Act the debt vested in the trustees, so as to entitle them to sue for it in their own names. The point raised by the replication is this.—Looking at the 194th section, everything has been done as regards registration which that section requires, but the provisions of the 192nd section as to registration have not been complied

1866.
PEARSON v. PEARSON.

with; and the argument for the defendants has been that the 194th section quoad registration having been complied with, it is not necessary to consider whether, as regards registration, the formalities of the 192nd section have been complied with. I do not concur with that argument. The 192nd section contemplates a certain deed, particularly and precisely described in that section. It goes on to provide, in part, for the registration of that deed, and the completion of the duty as regards registration is to be gathered from the 193rd section. So that the 192nd section, in the first part of it, refers to a particular deed, in the latter part of it provides for the registration of that deed, and the necessity for registration is made complete and obligatory by the 193rd section.

I think that the 194th section must be considered as introduced by way of parenthesis; and then the 197th section gives effect to the registration, and it says that "from and after the registration of every such deed or instrument in manner aforesaid," certain consequences shall follow; and I apprehend that although the 194th section may refer to a different deed from that under the 192nd section, yet the legislature must have considered it with reference to the 192nd section, and the particulars included in the latter part of the 193rd section. This deed has complied with registration quoad the 194th section; but it has not complied with the requisites of the 192nd and 193rd sections: and in my opinion unless a deed is properly registered under the 192nd and 193rd sections, it will not operate under the 197th section. It seems to me that, the requisites of the 192nd and 193rd sections not having been complied with, the trustees have no right to sue on this deed, and therefore there is nothing to disentitle the plaintiff, the assignor, to sue upon it for the benefit of the trustees.

Judgment for the plaintiff.

1866.

SUTTON *v.* THE SOUTH EASTERN RAILWAY COMPANY (*a*). *Nov*, 21, 1865.

The plaintiff, whose trade was to pack parcels and forward them by railway in a single package, having, under protest, paid to the defendants a sum in excess of what they charged certain wholesale houses for carrying parcels containing enclosures of their customers, sued to recover the excess, and at the trial adduced evidence (which was excepted to), upon which the Judge told the jury they were at liberty to find "that parcels had been carried by the defendants for other persons," viz., the wholesale houses, "containing goods of a like description, and under like circumstances, at a less rate than such goods were carried by them for the plaintiff, and that the defendants knowingly and purposely charged the plaintiff more than other persons." The plaintiff obtained a verdict and judgment, and in the Exchequer Chamber the exceptions were overruled, and judgment affirmed. The defendants continuing the same charges, the plaintiff issued a fresh writ of summons indorsed with a claim for an injunction, and applied under the 17 & 18 Vict. c. 125, ss. 79 and 82, upon affidavits stating facts substantially similar to the evidence adduced on the trial, for an injunction to restrain the defendants from charging him "for the carriage of his goods otherwise than equally with all other persons, and after the same rate, in respect of goods of the like description under the like circumstances."—*Held:* that this was not a case in which the Court would enjoin under that Act.

J. BROWN on a former day in this Term had obtained a rule calling on the defendants to shew cause why a writ of injunction should not issue to restrain the defendants from charging the plaintiff for the carriage of his goods otherwise than equally with all other persons, and after the same rate, in respect of goods of the like description under the like circumstances.

From the affidavits filed in support of the application, and in answer to it, the following facts appeared:—The plaintiff was a carrier, carrying on business under the name of *Sutton & Co.*, and having offices at various towns on the defendants' railway, the chief of these offices being in London. The business of the plaintiff consisted principally in making up and forwarding from his office in London to his agents in the different towns on the defendants' railway what are commonly termed "packed parcels," and receiving like parcels from his agents. "Packed parcels" consist of several parcels made up into one package with one address, the contents being various small parcels

(*a*) The report of this case was unavoidably postponed.

1866.

SUTTON v. SOUTH EASTERN RAILWAY CO.

which are received by the plaintiff at his offices, and there sorted by his servants according to the place to which they are respectively consigned. The "packed parcel" is then forwarded by the plaintiff on the defendants' railway to the place of its destination, and is there received by his agents, who themselves forward and deliver the small parcels which it contains to the persons to whom they are respectively addressed. The trade of collecting small parcels and making them up into a packed parcel is well known. The contents of the plaintiff's packed parcels consisted principally of drapery goods. The charges of the defendants for the carriage of goods upon their railway are made according to a tariff published in 1862, of which the following is an extract (*a*).

(*a*) The 6 & 7 Wm. 4, c. lxxv., s. 133, enacts, "That it shall be lawful for the said Company (i. e., the South Eastern Railway Company,) "from time to time to make such orders for fixing and by such orders to fix the sum to be charged by the said Company in respect of small parcels (not exceeding 100 pounds weight each) as to them shall seem proper: Provided always that the provision hereinbefore contained shall not extend to articles, matters or things sent in large aggregate quanties, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal and the like, but only to single parcels unconnected with parcels of a like nature which may be sent upon the railway at the same time." The 2 Vict [illegible] alii., s. 17, enacts, "That the [illegible]arges by the said recited Acts" [illegible]ter alia the 6 & 7 Wm. 4, c. lxxv.) "or either of them, authorized to be made for the carriage of any passengers, goods, animals or other matters or things to be conveyed by the said Company, or for the use of any steam power or carriage to be supplied by the said Company, shall be at all times charged equally to all persons, and after the same rate per mile or per ton per mile in respect of all passengers, and of all goods, animals or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line; and no reduction or advance in any charge for conveyance by the said Company or for the use of any locomotive power to be supplied by them, shall be made, either directly or indirectly, in favour of or against any particular Company or person travelling upon or using the same portion of the said railway."

"South Eastern Railway. Rates for small parcels and packages.

"The following rates for parcels or packages not exceeding 112 lbs weight include cartage to and from all places within the limits of the borough of Southwark and city of London and delivery in the country (wherever the Company has vehicles for that purpose), to distances not exceeding one mile from stations, but not collection. Beyond the limits of the borough of Southwark and city of London an extra charge will be made for cartage according to distance. No charge for booking at the Bricklayers' Arms Station nor at country stations.

	If Not exceeding 25 miles. s. d.	Conveyed not exceeding 46 miles. s. d.	Distances exceeding 46 miles. s. d.	
"Separate parcels or packages, not weighing more than 14 lbs.	0 6	0 8	0 10	
28	0 8	0 10	1 0	Unless more by Classification.
56	0 10	1 0	1 2	
84	1 0	1 2	1 4	
112	1 2	1 4	1 6	

"N.B.—*Parcels tied together or packed in a lump, whether the property of one or more consignees, will be charged at the rate of one penny for every pound weight, exclusive of cartage, but not less than the above rates.* Each consignment in each class, over 112 lbs weight, conveyed distances not exceeding 46 miles, 1*s.* 4*d.*, and exceeding 46 miles, 1*s.* 6*d.*, station to station, until amounting to more by classification rates."

In other cases varying rates of tonnage charges (much lower in proportion than the small parcels rate) were fixed by the said tariff according to the class of goods and merchandise tendered for carriage, all packages exceeding 112 lbs. weight being divided into five different classes, each class having a different rate of charge.

The plaintiff deposed that under the above regulation he

1866.
SUTTON v. SOUTH EASTERN RAILWAY CO.

was charged for all parcels forwarded by him and addressed to Sutton & Co. at any places on the defendants' railway at the rate of one penny per pound, irrespective of the contents of such parcels, and whether the same were packed or not, and although they exceeded 112 lbs in weight. It further appeared from the affidavits of several deponents, that certain wholesale houses in London (whose names were specified), who were in the habit of sending large quantities of their own goods by the defendants' railway, also habitually received inclosures from others, which they sent in packed parcels; that they did this constantly and on a large scale, and that they were never charged according to the defendants' tariff as for packed parcels, but according to the rates chargeable for drapery goods. The plaintiff further deposed that the present action was brought on the 1st of August, 1865, to recover 203*l.* 11*s.* 10*d.*, for overcharges made by the defendants against him for the carriage of goods on their railway between the 1st of June and the 31st of July, 1865, the gross sum charged having been paid by the plaintiff under protest, and exceeding the sum which would have been chargeable to the different wholesale houses for the carriage of similar goods during the same period by the amount claimed in this action. That the defendants still continued to make the same overcharges, and had made no alteration therein, notwithstanding the plaintiff had brought several previous actions for similar overcharges, and in one of them had obtained the judgment of the Court of Exchequer Chamber in his favour: *Sutton* v. *The South Eastern Railway Company* (*a*). The writ in the present action had been duly indorsed with notice of the plaintiff's intention to claim an injunction in the terms stated in the rule.

On the part of the defendants their goods manager

(*a*) 3 H. & C. 800.

deposed that all packed parcels, when known to be so, were charged by them at the rate of one penny per pound, and that they did not knowingly and wilfully charge any one less. That the parcels tendered by the wholesale houses had the usual appearance of bales or packages of merchandize, and that it is impossible to tell by the appearance of a particular parcel whether, with the drapery goods sent therein, other parcels are packed for the accommodation of customers. That although as a matter of public notoriety it is known that the wholesale drapers do sometimes enclose such parcels, yet the defendants' servants had never, so far as the deponent was aware, nor had he himself in any instance, known whether any specific parcel tendered for carriage contained other parcels enclosed therein, nor in any instance had they knowingly charged less than the published tariff rates. That, as the defendants cannot compel a declaration of the contents of packages, they form the best judgment they can, founded on their knowledge of the business in which the consignor is engaged and other circumstances, as to the class of goods, and charge accordingly when no declaration of contents is voluntarily made. Thus, in the case of goods presented by wholesale houses they charge the drapery rate, if the parcel in its outward form does not appear to contain goods for other persons. That the plaintiff's business is known to the defendants to be to pack goods, and that with rare exceptions all the parcels conveyed by him are packed, and that they charge him accordingly at the rate fixed by the tariff for packed parcels.

Field and *Phear* (with them *Meadows White*) shewed cause.—This is an application for an injunction under the powers contained in the 17 & 18 Vict. c. 125, s. 79 (*a*).

(*a*) The 17 & 18 Vict. c. 125, s. 79, enacts:—In all cases of breach of contract or other injury where the party injured is entitled

1866.
SUTTON v. SOUTH EASTERN RAILWAY CO.

But to a case like this that section is inapplicable. The alleged wrong, against which an injunction is sought, does not arise out of "contract," nor is it, within the meaning of the 79th section, the "repetition or continuance" of the same "injury," or the committal of an "injury of a like kind" "relating to the same property or right." The intention of the legislature in granting to Courts of Common Law the power to enjoin was to confer upon them a jurisdiction similar to that which, where the legal remedy is insufficient, Courts of equity exercise in aid of it. The decisions in Courts of equity are therefore a guide to the interpretation of the section in this sense that, if a Court of equity would not relieve, there is a strong presumption that the section was not intended to apply. Here a Court of equity would not relieve. No doubt in many cases it is the practice of a Court of equity to relieve by injunction when a legal right has been infringed. But to justify that mode of interference the right for which protection is sought must be a subsisting and continuing right;

to maintain, and has brought an action, he may, in like case and in like manner as hereinbefore provided with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or other injury of a like kind arising out of the same contract or relating to the same property or right, and he may also, in the same action, include a claim for damages or other redress.

Sect. 82 enacts :--It shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the Court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the Court or Judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such Court or Judge may seem reasonable and just; and in case of disobedience, such writ may be enforced by attachment by the Court," &c.

and further, it must be in the nature of a right of property: *The Emperor of Austria* v. *Day* (*a*). That a Court of equity will interfere by injunction to restrain the infringement of a trade mark is true; but in cases of trade mark it has been expressly decided that the jurisdiction is founded upon the invasion of the applicant's property, and not upon the fraud on the public: *The Leather Cloth Company* v. *The American Leather Cloth Company* (*b*); *Hall* v. *Barrows* (*c*). Further, the injury must be such that an action for damages will afford no adequate redress, otherwise an injunction will not be granted: *The Attorney General* v. *The Sheffield Gas Consumers' Company* (*d*). Here the redress by action is not inadequate. The plaintiff, by properly framing his declaration, can recover whatever sum he has been overcharged with interest during the time of its detention. Moreover, under the 17 & 18 Vict. c. 31, s. 3, the Court of Common Pleas has special powers, under which it would be fitter that the injunction should issue if on the part of the plaintiff any right to it can be established.

J. Brown (*Philbrick* with him), in support of the rule.—The Court has power, under the 17 & 18 Vict. c. 125, to grant the injunction. The defendants persist in the same violation of the plaintiff's right, notwithstanding it has been established by action: *Sutton* v. *The South Eastern Railway Company*, and *Sutton* v. *The Great Western Railway Company* (*e*). The case is strictly within the words of the 79th section, since there is an "injury of a like kind" "to the same right." The plaintiff has no ade-

(*a*) 3 De Gex, F. & J. 239, 240, 253.

(*b*) 1 H. & M. 271; and on appeal 33 L. J. Chan. 199.

(*c*) 33 L. J. Chan. 204.

(*d*) 3 De Gex. M. & G. 304.

(*e*) 3 H. & C. 800.

1868.
SUTTON v. SOUTH EASTERN RAILWAY CO.

quate means of redress if this injunction be not granted. It is no compensation to the plaintiff for the injury which he has sustained if he merely recovers back the sum which he has been overcharged, nor does it prevent the repetition of the injury. [*Pollock*, C. B.—By properly framing his declaration, the plaintiff can recover interest by way of damages as well as the sum overcharged.] In *Crouch* v. *The Great Northern Railway Company* (*a*) the declaration was framed in tort, but it was held that the sum overcharged was all the plaintiff could recover. [*Pollock*, C. B.—The damages which the jury there awarded were not the necessary consequence of the injury. But if it were alleged in the declaration that the defendants refused to deliver to the plaintiff his goods, and thereby wrongfully compelled him to pay a sum of money, and the claim was for damages for being wrongfully kept out of the use of the money so paid, in that case, I apprehend, interest might be recovered as damages, from the time the money was detained.] The mere return of the money, even with interest, is no compensation to a trader for the loss sustained by being kept out of the use of it. As to the objection that the right sought to be protected must be of a continuing character, it is as much so here as in the case of a trade-mark, or a nuisance. The suggestion that the plaintiff may send no more packed parcels on the defendants' railway is a most improbable one, when contrasted with the allegations in the plaintiff's affidavits. Although there is an absence of direct authority on the point before the Court, the opinions of text writers are fortified by expressions of judicial opinion which favour this application. Thus, in *The River Dun Navigation Company* v. *The North Midland Railway Company* (*b*), Lord *Cottenham* commented with approval on the salutary effects of the jurisdiction exercised

(*a*) 11 Exch. 742. (*b*) 1 Railw. Cas. 153.

by the Court of Chancery by way of injunction for the purpose of keeping Companies within the powers which their acts give them. Hodges on Railways, 3rd ed., pp. 750, 751, contains the following passage: "Many other instances may be mentioned in which injunctions have issued to restrain the proceedings of railway Companies, as ..... to restrain a railway Company from charging the plaintiff higher rates for the carriage of goods than they charged to other persons for the carriage of like goods under like circumstances." [*Channell*, B.—That passage would seem in your favour, but on looking at the note appended to it I find that it refers to p. 664, and the authorities to be found at p. 664 (*a*) do not warrant the passage.] In Story's Equity Jurisprudence, 6th ed., 959 b, it is said "that Courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld.....The jurisdiction of these Courts thus operating by way of special injunction, is necessarily indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence." The Court will hesitate before establishing a precedent for cutting down the operation of a most beneficial and remedial enactment.

As regards the form of the injunction it is the same as in *Baxendale* v. *The Great Western Railway Company* (*b*). It is true that in that case the injunction was granted by the Court of Common Pleas under the powers conferred by the 17 & 18 Vict. c. 31, but the 6th section of that Act expressly preserves existing remedies.

(*a*) *Finnie* v. *The Glasgow Railway Company*, 15 Ct. Sess. Cas. 523; *The Attorney General* v. *The Birmingham and Derby Junction Railway Company*, 2 Railw. Cas. 124; *Branley* v. *The South Eastern Railway Company*, 12 C. B. N. S. 63.

(*b*) 5 C. B. N. S. 356, note.

1866.

SUTTON v. SOUTH EASTERN RAILWAY CO.

POLLOCK, C. B.—We are all of opinion that this rule should be discharged. The power to grant an injunction in a case like this, even if it be true, as is alleged, that we possess it, ought at all events to be exercised in such a case with great caution, there being no appeal from our decision. We have asked in vain for some authority for our interference, the plaintiff's counsel being unable to adduce any instance in which, under circumstances like the present, the Court has interfered. A passage from Hodges on Railways, 3rd ed., pp. 750, 751, has been quoted as shewing that learned author's opinion in favour of the application, but in all the authorities which have been referred to, and which have any bearing on the present case, the injunction was refused. We are asked to make a precedent; but, where the matter is one of novelty, and there is no appeal from our decision, we should be careful not to exceed the limits of our jurisdiction.

It has been urged upon us that, looking at this case on its merits, if an injunction be not granted the plaintiff can have no adequate remedy. That, I think, is not so. The amount which the plaintiff has overpaid he can clearly recover by action, and in my judgment he can also recover interest by way of damages, from the time when the money was detained. Our interference by injunction would be attended with no real advantage to the plaintiff, and considerable inconvenience might result from it. Thus, if we granted the injunction, and afterwards it was sought to enforce it by attachment, the question would come before us on conflicting affidavits whether or not the injunction had been disobeyed. That question we could not decide on affidavits, nor would it be proper to refer it to a Master. Ultimately we should be compelled to direct an issue, and, under these circumstances I think it more expe-

dient that the plaintiff should appeal to a jury in the first instance if his rights have been infringed.

BRAMWELL, B.—I am of the same opinion. Even assuming that all the other difficulties in the case can be surmounted, I think on the grounds stated by the Lord Chief Baron that the rule should be discharged. We are asked, in the first place, to affirm a doubtful proposition of law, and secondly, to say that the facts of this case bring it within the proposition. And from our decision there is no appeal. That being so, it is far better that this application should be made to a Court from whose decision an appeal will lie.

CHANNELL, B.—I am of the same opinion. This is an application under the 79th section of The Common Law Procedure Act, 1854, which section was intended to give this Court jurisdiction by way of injunction in a large class of cases where it was expedient to save the suitor from the delay and expence which would be entailed on him if, to obtain redress, he were compelled to have recourse to a Court of equity. Now, I am by no means disposed to restrain or in any way restrict the beneficial operation of that section, but I certainly think that it was intended to apply to a different class of cases from that which is now before us. I am the more unwilling to place a construction on this section which I am not satisfied is correct from the consideration of the inconvenience which would arise upon an application to this Court to enforce the injunction, from the circumstance that under the Railway and Canal Traffic Act the Common Pleas may have larger powers, and that if the plaintiff's argument is well founded, there is ground for an application to the Court of Chancery, and

1866.

SUTTON v. SOUTH EASTERN RAILWAY CO.

finally that the question of the plaintiff's right to sue at all is still awaiting determination in the House of Lords.

PIGOTT, B.—I agree, and on the best consideration I can give the matter I think the 79th section of the Common Law Procedure Act, 1854, points to a different class of cases. Moreover, if the plaintiff's argument is well founded he can apply to the Court of Common Pleas and obtain relief. We are asked to exercise a jurisdiction which would greatly embarrass the defendants' trade, and which, as there is no appeal from our decision, might be productive of serious injustice. Before we do that, I think we ought to be able to see clearly that this is a case within the act of parliament.

Rule discharged.

April 21.

THE ATTORNEY GENERAL *v.* ARCHER UPTON, ROBERT UPTON AND HENRY JENKINSON.

In 1851, a testator devised certain real estate to his wife for life, with a general power of appointment. The testator died in 1856, and in 1858 his wife exercised the power by appointing an annuity of 200*l.* a year, charged upon the lands, in trust for the wife of the testator's nephew.—*Held*, that under the 4th section of the Succession Duty Act, 1853, the testator's wife, at the time she exercised the power, become entitled to the property appointed as a "succession," and that the annuitant acquired a new succession from her, not from the testator, as predecessor, and was therefore liable to pay 10*l.* per cent. duty.

INFORMATION in equity by the Attorney General (so far as material), as follows:—

1. Henry Fanshawe, late of Tilbuster Lodge, near Godstone, in the county of Surrey, Esquire, a rear admiral in the Royal Navy, by his will, dated the 14th day of April, 1851, and duly executed, gave and devised his manor, mansion house, and other hereditaments in the parish of Great Bedwin, in the county of Wilts, with their appurtenances,

to the use of his wife, Caroline Fanshawe, and her assigns, during her life without impeachment of waste, with a limitation to trustees during her life to preserve contingent remainders; and after the decease of his said wife, to such uses and upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes and declarations as his said wife should by any deed or deeds, to be by her duly executed from time to time, or at any times, or by her last will and testament, direct and appoint; and in default of such direction and appointment and so far as no such direction or appointment should extend, to certain uses thereby declared for the benefit of the testator's nephews Charles Fanshawe and John Fanshawe respectively, and their respective issue male.

2. The said testator died on the 9th day of August, 1856, being after the time appointed for the commencement of the Succession Duty Act, 1853, without having revoked or altered the before stated disposition of his real property at Great Bedwin, made by his said will; and upon his death his widow, Caroline Fanshawe, by reason of such disposition, became beneficially entitled in possession to the said real property during her life, and had also a general power of appointment over the same by deed or will.

3. Afterwards, by a certain deed poll in writing dated the 3rd day of August, 1858, by her duly executed, the said Caroline Fanshawe exercised her aforesaid power and made an appointment thereunder in manner following: that is to say, she appointed that the lands and hereditaments at Great Bedwin aforesaid, with their appurtenances, should, immediately after her decease, go and remain to the use and intent that the above named defendants Archer Upton, Robert Upton and Henry Jenkinson, and the survivors and survivor of them, and the executors or administrators of such survivor, or other the trustee or trustees

1866.

ATTORNEY GENERAL v. UPTON.

for the time being of the annuity intended to be thereb granted, should, during the lives of Elizabeth Fanshawe, th wife of the said John Fanshawe, and all and every the chil and children of the said John Fanshawe by the said Eliz beth Fanshawe, and the life of the longest liver of then respectively, yearly receive an annuity of 200*l.*, free fro deduction, to be charged upon the same lands and heredit ments and held upon the trusts thereinafter declared, an to be payable by equal quarterly payments. And it w thereby declared that the said Archer Upton, Robert Upto and Henry Jenkinson, and the survivors and survivor them, and the executors or administrators of such survivo or other the trustee or trustees for the time being, shoul stand possessed of the same annuity, upon trust to pay th same to the said Elizabeth Fanshawe during her life, f her separate use.

4. The said Caroline Fanshawe died on the 12th day March, 1863, leaving the said Elizabeth Fanshawe survivir her. The said Elizabeth Fanshawe is still living, and th above named defendants on her behalf have become entitle to and are in the receipt of the annuity of 200*l.* limited them by the before stated deed of appointment by reaso of the disposition thereof thereby made as aforesaid.

5. The interest of the said Elizabeth Fanshawe in th said annuity is a succession within the meaning of th Succession Duty Act, 1853, and duty is payable in respe thereof; and the Attorney General insists that the prop rate of duty is 10 per cent., inasmuch as such interest derived from the said Caroline Fanshawe as predecesso and both the said Elizabeth Fanshawe and her husband a strangers in blood to the said Caroline Fanshawe; but th defendants decline to pay duty at that rate, alleging on th contrary that the interest of the said Elizabeth Fanshaw is derived from her husband's uncle, the testator, Admi

Fanshawe, as predecessor, and that consequently the proper rate of duty is 3 per cent. only.

Prayer (inter alia):—

That it may be declared that duty at the rate of 10 per cent., or at some other rate, is payable in respect of the succession of the said Elizabeth Fanshawe on the annuity of 200*l.* appointed in her favour by the before stated deed of appointment, and that the defendants may be decreed to pay what shall be found due in respect thereof to the Receiver General of Inland Revenue for her Majesty's use.

The defendants by their answer admitted that the statements contained in the 1st, 2nd, 3rd and 4th paragraphs of the information were true. They also admitted that Elizabeth Fanshawe and her husband were strangers in blood to Caroline Fanshawe, but they submitted that the interest of Elizabeth Fanshawe in the annuity was not a succession within the meaning of the Succession Duty Act, 1853, and that no duty was payable in respect thereof; and further, that if the said interest were a succession and any duty was payable in respect thereof, such interest was not derived from Caroline Fanshawe, as predecessor, but from the testator, Admiral Fanshawe, and that the husband of Elizabeth Fanshawe being related to Admiral Fanshawe, the proper rate of duty (if any) was 3*l.* per cent. only.

The *Attorney General* and *Solicitor General* (with whom were *Locke* and *J. P. Leigh*), for the Crown.—The case falls within the first branch of the 4th section (*a*) of the Succes-

(*a*) Sect. 4.—"Where any person shall have a general power of appointment, under any disposition of property, taking effect upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived

1866.

ATTORNEY GENERAL v. UPTON.

sion Duty Act, 1853 (16 & 17 Vict. c. 51). Caroline Fanshawe had a general power of appointment under the will of her husband, Admiral Fanshawe, and when she exercised that power by making an appointment in favour of Elizabeth Fanshawe, she became entitled to the property thereby appointed as a succession derived from Admiral Fanshawe, the donor of the power; and, if she had not been his wife she would be liable to pay succession duty. Then, Caroline Fanshawe having acquired a succession, upon her death Elizabeth Fanshawe became beneficially entitled to the property. If Caroline Fanshawe had made the appointment with her own property, Elizabeth Fanshawe, being a stranger in blood to her, would have been liable to pay duty at the rate of 10*l.* per cent. and the same duty is now payable. The case is rendered more clear by reference to analogous decisions under the Legacy Duty Acts, which are in pari materia with the Succession Duty Act. Under the 36 Geo. 3, c. 52, sects. 7, 18, legacy duty is payable both by the donee of the power and the appointee under it *Drake* v. *The Attorney General* (*a*). The 7th section of the Act has an effect corresponding with the 2nd section of the Succession Duty Act, and the first branch of the 4th section of the latter Act has an effect corresponding with the 18th section of the Legacy Duty Act: *The Attorney General* v. *Gardner* (*b*); *In re Wallop's Trusts* (*c*). [*Martin*, B., referred to the 33rd section.] That section would have applied if the testator and Caroline Fanshawe had not been husband and wife. In the cases of *In re Lovelace* (*d*),

from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect upon any such death, over property, any person taking any property by the exercise of such power, shall be deemed to take the same as a succession derived from the person creating the power, as predecessor."

(*a*) 10 Cl. & F. 257.
(*b*) 1 H. & C. 639.
(*c*) 1 De Gex J. & S. 656.
(*d*) 4 De Gex & J. 340.

re Barker (*a*), and *The Attorney General* v. *Lord Braybrooke* (*b*), the power took effect *before* the passing of the Succession Duty Act, and therefore the 4th section did not apply. In this case the power took effect upon the death of a person who died *after* the commencement of the Act, so that the case is within the express words of the 4th section. The object of that section was to prevent the operation of the technical rule of law that the appointee under a power takes as though the limitation in his favour had been introduced into the instrument creating the power. If the donee of a power, who might have appointed the property to himself, appoint it to another person, the latter derives his interest from the donee, not the creator of the power.—They also referred to *The Attorney General* v. *Brackenbury* (*c*).

Bovill and *Hannen*, for the defendants.—First, no succession duty is payable. Caroline Fanshawe had no interest in the property devised beyond her life estate, and the execution of the power of appointment was not a "disposition" within the meaning of the Succession Duty Act. According to the argument for the Crown, duty is payable in respect of the same property, both by the donee of the power and the appointee under it. But the legislature could never have intended that upon the creation of one interest two duties should be payable. The Legacy Duty Acts have no bearing on this case, their language being different from that of the Succession Duty Act. It is conceded that this case comes within the 4th section of the Succession Duty Act. That section deals with two classes of powers of appointment. The first branch of the section relates to general powers, the second to limited powers. In

(*a*) 7 H. & N. 109.
(*b*) 5 H. & N. 488; in error, 9 H. L. 150.
(*c*) 1 H. & C. 782.

1866.

ATTORNEY GENERAL v. UPTON.

the case of a general power, the duty is payable by the person who exercises the power. If the power be limited, the appointee must pay the duty, and in both cases the succession is to be deemed a succession derived from the donor or creator of the power; *The Attorney General* v. *Lord Braybrooke* (*a*). Where a case is within the 4th section that regulates the duty, and the 2nd section has no application. In the case of *In re Lovelace* (*b*), *Turner*, L. J., said that "the express provision of the 4th section, that the donee of the power should be the successor, would, in the cases in which it applied, override the general provision of the 2nd section, placing the appointee in that position."

Secondly, assuming that succession duty is payable by Elizabeth Fanshawe, it is only at the rate of 3*l.* per cent. The case is free from authority, except so far as the Court may consider itself bound by the ratio decidendi in *In re Barker* (*c*). If the case is within the 2nd section Elizabeth Fanshawe derived her succession from the donor of the power, not from the appointor: *In re Barker* (*c*). The 2nd section cannot receive a different construction because the 4th creates a succession in the person who exercises the power. The Act must be construed with reference to the established rule that a person who takes under a power of appointment takes from the person who created the power, not the person who executes it. It is as though the limitation created by the execution of the power had been introduced into the instrument conferring the power: *The Attorney General* v. *Floyer* (*d*); *The Attorney General* v. *Lord Braybrooke* (*a*). [*Martin*, B.—It seems to me that by the 4th section, when the donor of a power exercises it, he is in the same position as if he were the owner of the property; and having appointed it in favour of another person, the latter

(*a*) 5 H. & N. 488; in error, 9 H. L. 150.

(*b*) 4 De Gex & J. 340. 350.

(*c*) 7 H. & N. 109.

(*d*) 7 H. & N. 238.

derives a succession from him.] The 4th section does not impose any duty upon the appointee under the power, and therefore, if duty is payable by him it must be under the 2nd section. The 4th section is general in its terms, and deals with every disposition of property which the donee of a general power of appointment may create. Without that section the donee of a general power who appointed the property to himself would have escaped the payment of duty, for he would not have created a succession. The effect of the 4th section is, that the donee of a general power at the time he exercises it takes a succession, whether he appoints it in favour of himself or any other person; but in the latter case the succession which the appointee takes is governed by the 2nd section.

The Attorney General, in reply, was stopped by the Court.

POLLOCK, C. B.—I am of opinion that the Crown is entitled to duty at the rate of 10*l.* per cent. The case of *In re Barker* (*a*) has no bearing on this case. There the power was created before the Succession Duty Act came into operation, and therefore the 4th section did not apply. In the present case it does.

The Act appears to me remarkably well drawn. Few public Acts are entitled to so much commendation, as shewing a perfect acquaintance with the subject-matter, and the means of producing the results which were obviously in the contemplation of those who framed the law. It is well known that the real property law of this country is extremely artificial, creating an apparent difference, and professing to create a difference where in substance there is none; for instance, creating a difference between an

(*a*) 7 H. & N. 109.

1866.

ATTORNEY GENERAL v. UPTON.

estate left to a man and his heirs and an estate left to a man for his life with a power by deed to dispose of the remainder, so that he might exercise the power in favour of himself and give himself the fee simple. The law very properly makes a distinction between the two cases, because in the latter the man is required to do a certain act before he can acquire any interest beyond a life estate. Again, a tenant in tail in possession, by executing a disentailing deed, can convert the estate tail into a fee simple.

Here the testator left to his wife an estate for life, with power by deed to dispose of the remainder. No doubt, a person to whom a life estate is devised may say, "I want nothing more than an estate for life, and I will not trouble myself about any larger estate:" and then he would only be liable to pay succession duty upon his life estate. But if a person having a life estate with power by deed to dispose of the remainder, chooses to execute the power, the Act says that eo instanti he shall be considered as having the fee simple and pay duty accordingly.

It appears to me, therefore, that the wife of the testator became in the same position as if the whole estate had been devised to her; for the moment she exercised the right to dispose of the remainder she acquired a dominion over the fee simple as effectually as if it had been devised to her by her husband.

If the case had not fallen within the 4th section, probably only 3*l.* per cent. duty would be payable, but being within that section the result is that when the wife of the testator exercised the power of appointment she in substance took the whole estate, and the appointee derived a succession from her and not from the creator of the power; and being a stranger in blood to her the rate of duty is 10*l.* per cent.

MARTIN, B.—At first I was disposed to concur entirely

with the argument for the Crown, but the argument for the defendants has had a considerable effect upon me, and I am by no means sure that theirs is not the right view. I do not, however, entertain so strong an opinion as to induce me to differ from the rest of the Court.

It seems to me that the question depends on the definition of the term "succession" in the 1st section of the Act, and upon the 2nd, 4th and 33rd sections; and that it is necessary to examine all those sections in order to ascertain the true meaning of the Act. The doubt in my mind arose from the 33rd section, which enacts that "where the donee of a general power of appointment shall become chargeable with duty in respect of the property appointed by him under such power, he shall be allowed to deduct from the duty so payable any duty he may have already paid in respect of any limited interest taken by him in such property." That section seems to me to contemplate that the donee of a general power of appointment may, under certain circumstances, be liable to pay duty in addition to that which he has already paid; and therefore the section is in favour of the argument for the defendants.

The 1st section enacts that "the term 'succession' shall denote any property chargeable with duty under this Act." The 2nd section is a general enactment, and if it had stood lone I apprehend that a person taking under a power ould, by reason of that section, be liable to duty as taking om the settlor, according to the rule of law that a person king under a power derives his interest from the person ho created the power. The 3rd section, which relates to int tenants, may be left out, and the 4th section read as it immediately followed the 2nd and the two sections re in pari materiâ.

The question then is, what is the meaning of the 4th ion? A distinction is drawn between a *general* power

1866.

ATTORNEY GENERAL v. UPTON.

of appointment and a *limited* power of appointment. The first part of the section relates to a general power of appointment, and it enacts that "where any person shall have a general power of appointment, &c., he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a *succession derived from the donor of the power.*" The most ordinary case is that of an estate for life with a power of appointment by will, and if the donee of the power makes an appointment he will be deemed to be entitled at the time of his death to the property as a succession derived from the donor of the power. It seems to me that, giving the statute a reasonable construction, it has created a constructive property in the donee of the power equal to the property which he gives to the person in whose favour he executes the power. In this instance the donee of the power gave to Elizabeth Fanshawe an annuity of 20*l.* during her life; and, coupling that with the definition of "succession," it seems to me that the donee of the power must be deemed to have taken, at the moment of her death, the property or interest chargeable with duty from her husband as donor of the power, and that she must be considered owner of the property and as disposing of it as her own property, and creating a new succession in the person in whose favour she executed the power. That seems to me not an unreasonable construction of the statute; but at the same time I think that the argument for the defendants is entitled to great consideration.

With respect to the case of *In re Barker* (*a*), I think it was rightly decided; but judgment was given under the circumstances. The Attorney General said that he would be content with duty at the rate of 3*l.* per cent., and the

(*a*) 7 H. & N. 109.

defendant's counsel having said that the defendants were willing to pay it, the Court gave judgment accordingly. Therefore that case is not binding upon us as an authority in this case. I have stated what appears to me a difficulty in the construction of the act of parliament, although it does not operate so strongly on my mind as to induce me to differ from my learned brothers.

BRAMWELL, B.—I am also of opinion that the Crown is entitled to judgment. It seems to me that the case is clear. I am not inclined to rely upon the opinion which I expressed in *In re Barker*, although my present opinion is very much in conformity with it, because I do not understand the distinction which the then Attorney General made in that case. I think that the Crown is entitled to duty under the 2nd section, and that the 4th does not give the Crown its title, but confirms my view of the 2nd section. If, however, I am wrong, the 4th section must give the Crown a title.

It is conceded by the defendant's counsel that if the fee simple in this estate had been devised to the testator's wife, and she had out of it devised this annuity, the Crown would have been entitled to the duty of 10*l.* per cent. But it is said that because the testator's wife took an estate for life only with a power of disposing of the remainder the Crown is only entitled to a duty of 3*l.* per cent. The objection is not a matter of substance, but a mere matter of words, and is opposed to the principle laid down by Lord *Campbell* in *Lord Braybrooke's Case* (*a*) "that this statute, which, by the same enactment, imposes a tax on successions in every part of the United Kingdom, is to be construed, not according to the technicalities of the law of real property in England or in Scotland, but according to

(*a*) 9 H. L. 150. 164.

1866.

ATTORNEY GENERAL v. UPTON.

the popular use of the language employed." And in tl same case Lord *Kingsdown* said that "it was always mo satisfactory to deal with the case on the substance and re effect of the transaction."

Bearing in mind those general principles, let us s what the 2nd section says. No doubt, as a matter legal expression, an appointee takes under the creator the power, and not under the donee of it. If there w any necessity for applying that technical rule to the inte pretation of the 2nd section, we ought to do so. But r technical words are used in that section. It says "eve past or future disposition of property by reason where any person has or shall become beneficially entitled to ar property." Can anyone say that the appointee becar entitled to this annuity by reason of the disposition whic the testator made of the real estate? Certainly not i point of law. The disposition by reason whereof tl appointee became entitled was the disposition made b the donee of the power. The section also says that suc disposition "shall be deemed to have conferred or t confer on the person entitled by reason of any such di position or devolution a succession; and the term 'su cessor' shall denote the person so entitled; and the ter 'predecessor' shall denote the settlor, disponor, testato obligor, ancestor or other person from whom the intere of the successor is or shall be derived"—not using a ter of art, but saying *any other person* from whom the intere of the successor is or shall be derived. Then from who is the interest of these successors derived? Can it be sai that it was derived from the testator, and not from tl donee of the power? As I said in the case of *In re Barke* these are ordinary English words, and ought to be construe as any Englishman, not a lawyer, would construe the I do not cast any doubt upon the rule of law, that whe

a power is executed the appointee takes under the creator of the power, and not under the donee of it; but that rule does not apply here. For these reasons I think that this case is within the 2nd section, and that view is corroborated by the 4th section.

But supposing my view is wrong, and that under the 2nd section alone the Crown would not be entitled to 10*l.* per cent. duty, I think that from the effect of the 4th section the Crown must inevitably be entitled, for although I fully appreciate the argument for the defendants that the object of the 4th section was to shew what were "successions," and who were "predecessors," and what rate of duty should be paid, yet when I find it there stated that a person who exercises a general power of appointment "shall be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power," it seems to me necessarily to follow that, having got the property as a succession, he is, from that time, a person from whom the appointee derives his succession. The subject may be illustrated thus:—"Devise to A. B. for life, with a general power of appointment to C. D. C. D. appoints to himself for life, with remainder in fee to E. F. At the time of his exercising the power C. D. is to be deemed entitled to the property or interest thereby appointed as a succession derived from the donor of the power. He operates on all the interest derived by him from the donor of the power; but a portion of that interest is the remainder in fee, and that cannot be said to come to E. F. from the creator of the power.

With respect to the distinction made in the case of *In re Barker*, that the 4th section would make the grant of a general power of appointment before the passing of the Act, when the power took effect, take effect after the pass-

1866.
ATTORNEY GENERAL v. UPTON.

ing of the Act, I do not think that can have been the intention of the 4th section. I cannot see why a different duty should be paid, or a different provision be made, with respect to those powers which came into effect *after* the passing of the Act, and those which came into effect *before*. Another difficulty is this. The latter part of the 4th section says that "where any person shall have a limited power of appointment under a disposition taking effect *upon any such death*." Now, it is manifest that does not mean a power taking effect upon the death; and if it does not mean that in the latter part of the section, it does not mean it in the first part of the section. It seems to me, therefore, that the distinction taken by the Attorney General in the case of *In re Barker*, although prudent for him to take, is an unfounded distinction.

For these reasons I think that the Crown is entitled under the 2nd section, but, if not, at all events under the 4th section.

PIGOTT, B.—I am also of opinion that the Crown is entitled to duty at the rate of 10*l.* per cent.; and I come to that conclusion from the construction which I put upon the 2nd and 4th sections taken together. If the case had been within the 2nd section alone, I should have been of opinion that the Crown was only entitled to duty at the rate of 3*l.* per cent., because the appointee under the power would, by operation of law, have derived her interest from the person who created the power, not from the person who executed it. However, it is not necessary to determine that, because, in my judgment, the effect of the 4th section is to give the person who exercises the power the interest in the estate. When the testator's wife executed the power she was entitled, under his will, to a general power of appointment, and the 4th section sa

that in the event of such a person "making any appointment thereunder, he shall be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed." I construe that to mean "deemed to be entitled for all purposes." It is true the section goes on to say "as a succession derived from the donor of the power;" but I apprehend that means that the person executing the power shall pay duty as upon a succession derived from the donor of the power, but the property is vested in him for all purposes. Here the property, being vested in the testator's widow by the execution of the power, she gives a portion of it to the appointee. Then from whom did the latter derive her succession? It is not consistent to say that she derived it from the testator. She derived it from the donee of the power under the appointment, and the word "predecessor," as defined in the 2nd section, may be properly so construed. Who but the donee of the power is the person from whom, in this instance "the interest of the successor is derived"? Those words ought to have something appended to them if they are to be construed otherwise than according to their ordinary legal signification. Although, if the section had stood alone, the "predecessor" would have been the testator, yet from what follows in the 4th section, the "predecessor" is his widow, who derived her succession from him. The 2nd section contains no exception as to anything that follows; and therefore, it seems to me that the 2nd and 4th sections ought to read together. In fact, the testator's widow took the estate when she exercised the power of appointment, and then by making the appointment she conferred a succession on the appointee, who then became liable to pay a duty of 10*l.* per cent.

Decree accordingly.

1866.

April 23.

The 6th section of the 55 Geo. 3, c. 137 (which imposes a penalty of 100*l.* on any parish officer who shall supply, for his own profit, any goods, materials, or provisions for the use of any workhouse, or otherwise for the support and maintenance of the poor), is not repealed by the 77th section of the 4 & 5 Wm. 4, c. 76, which subjects to a penalty of 5*l.* any parish officer who shall supply, for his own profit, any goods, materials or provisions to an individual pauper.

ROBINSON *v.* EMERSON.

DECLARATION.—For that whereas, durir times hereinafter mentioned, there was a unic parish of Stanhope, in the county of Durham, ε other parishes, formed for the purpose of admini the laws for the relief of the poor by the nai Weardale Union, which union, now so formed p and in accordance with the laws in force relati poor, and was called the Weardale Union. An during all the times hereinafter mentioned, th workhouse situate in the county aforesaid which and was duly constituted to be, and was, one of mon workhouses or places of reception and rel poor of such parishes, and of the said union, pı and in accordance with the same laws: and where all the times hereinafter mentioned, there was ε guardians of the poor for such union duly consti chosen pursuant to and in accordance with the s and whereas, during all the times hereinafter n the defendant was one of the overseers of the pı said parish of Stanhope, duly appointed in thı and the defendant, while he was such oversee divers, to wit, 100 times and occasions, before mencement of this suit, in his own name, provic and supply for his own profit, and was directly in providing, furnishing and supplying, for his divers goods and materials for the use of such and otherwise for the support and maintenance o of the said parishes so forming the said unio defendant, not having at any time obtained any

from any justice of the peace, or of any other person, permitting and suffering him so to do, or permitting him or suffering to contract for the purchasing or supplying of the same, or any articles or things whatsoever, contrary to the form of the statutes in such case made and provided: whereby, and by force of the statutes in such case made and provided, the defendant forfeited for each of the said offences the sum of 100*l.*, and thereby, and by force of the statutes in such case made and provided, an action hath accrued to the plaintiff to demand and have of the defendant the said sum of 100*l.* for each of the said offences, amounting altogether to 5000*l.* and the defendant has not paid the same.

Demurrer, and joinder therein.

G. Atkinson, Serjt., in support of the demurrer.—The 6th section of the 55 Geo. 3, c. 137, upon which the declaration is framed, is repealed by the 4 & 5 Wm. 4, c. 76, s. 77. The 55 Geo. 3, c. 137, s. 6, imposed a penalty of 100*l.* on any parish officer who should supply for his own profit any goods "for the use of any workhouse or workhouses, or otherwise, for the support and maintenance of the poor." The 4 & 5 Wm. 4, c. 76, s. 77, subjects to a penalty of 5*l.* any parish officer who shall "furnish or supply, for his own profit, or on his own account, any goods, materials or provisions ordered to be given in parochial relief, &c., to any person in such parish or union." By the former enactment the whole penalty is given to any person who shall sue for the same in any of the superior Courts; by the latter enactment the penalty is recoverable before two justices, and one half is given to the informer, and the other half in aid of the poor rates. In *Henderson* v. *Sherborne* (*a*) the question arose whether a parish officer

(*a*) 2 M. & W. 236.

1866.
ROBINSON v. EMERSON.

who supplied goods for his own profit to *an individu pauper* was liable to the penalty imposed by the 55 Geo. c. 137, s. 6, and this Court held that he was not. B there Lord *Abinger*, C. B., said:—"If the 77th section the new Poor Law Act embraces this case, I do not agr that it does not amount to a repeal of the former enactmei If a crime be created by statute, with a given penalty, a be afterwards repeated in another statute with a less penalty attached to it, I cannot say that the party ought be held liable to both. There may, no doubt, be tv remedies for the same act, but they must be of a differe nature. The new Act, then, would be, in effect, a repe of the former penalty." In a subsequent case of *T Attorney General* v. *Lockwood* (*a*) Lord *Abinger* said th his judgment in *Henderson* v. *Sherborne* (*b*) "was found on the principle that where the same offence is re-enact with a different punishment, it repeals the former law [*Bramwell*, B.—The 51st section of the 4 & 5 Wm. c. 76, extends the penalty imposed by the 6th section the 55 Geo. 3, c. 137, to persons appointed under tl 4 & 5 Wm. 4, c. 76. *Martin*, B.—The two enactmen are framed with different objects. The 55 Geo. 3, c. 13 s. 6, subjects parish officers to a penalty for supplying, f their own profit, goods *for the use of any workhouse or t poor generally*; the 4 & 5 Wm. 4, c. 76, s. 77, relates to tl supply of goods ordered to be given *to an individual paup* in parochial relief.] By the interpretation clause of tl latter Act, (sect. 109,) the word person would include workhouse, which is now a corporate body, as well as a individual.

Manisty (with whom was *Wills*) appeared in support o the declaration, but were not called upon to argue.

(*a*) 9 M. & W. 378. 391. (*b*) 2 M. & W. 236.

MARTIN, B.—I am of opinion that the declaration is good. After stating that there was a union of the parish of Stanhope and other parishes for the administration of the poor law, called the Weardale Union, and that a workhouse of the union and a board of guardians were duly constituted, it proceeds to state that the defendant was one of the overseers of the parish, and that whilst he was such overseer he did in his own name provide, furnish and supply, for his own profit, and was directly concerned in providing, furnishing and supplying, for his own profit, divers goods and materials for the use of such workhouse and otherwise for the support and maintenance of the poor of the said parishes so forming the said union, he not having any certificate from any justice permitting him so to do. That is within the terms of the enactment of the 55 Geo. 3, c. 137; therefore, primâ facie, there is a cause of action. There is a demurrer to the declaration, and my brother *Atkinson* contends that the effect of the 77th section of the Poor Law Amendment Act (4 & 5 Wm. 4, c. 76,) is to repeal the 6th section of the 55 Geo. 3, c. 137. In my opinion that is not so.

It is clear that the object of the 77th section of the 4 & 5 Wm. 4, c. 76, was to remedy a defect which, by the decision in *Proctor* v. *Manwaring* (*a*), was found to exist in the former statute. If that case was wrongly decided, and the supply of goods to an individual pauper is within the 55 Geo. 3, c. 137, then, a different amount of penalty being imposed by the 4 & 5 Wm. 4, c. 76, it might be successfully contended that the latter enactment repealed the former so far as regards such a supply. It seems to me that the reasoning of Lord *Abinger* in *Henderson* v. *Sherborne* is sound. Where a statute prohibits a particular act, and imposes a penalty for doing it, and a subsequent sta-

(*a*) 3 B. & Ald. 145.

1866.
ROBINSON v. EMERSON.

tute imposes a different penalty for the same offence, the latter statute operates as a repeal of the former. But it was never intended that the 77th section of the 4 & 5 Wm. 4, c. 76, should repeal the 6th section of the 55 Geo. 3, c. 137,—in fact the contrary appears.

No doubt the real cause of the enactment in the 4 & 5 Wm. 4 was the decision in *Proctor* v. *Manwaring* (*a*), that where an overseer who received an order for the relief of an individual pauper paid her part in money, and by her consent gave her the remainder in goods from his shop, he was not liable to the penalty imposed by the 55 Geo. 3, c. 137. There *Abbott*, C. J., in delivering judgment, said: —" It would have been very easy for the legislature, had they so intended it, to have said that it should not be lawful for an overseer to deliver to any pauper articles in lieu of money ordered for relief, they have not so expressed themselves." And *Holroyd*, J., said:—" However desirable it may perhaps be to prevent the mischief attending such cases as the present, yet we cannot extend a penal statute so as to bring this case within it. The words of the statute appear to me applicable only to a general supply of the poor by the parish officers." The legislature thought that state of things ought not to exist, and directly interfered by imposing a penalty of 5*l.* on any parish officer who should supply goods for his own profit to an *individual pauper*, but instead of giving the penalty to any informer who should sue for it they made it recoverable before two justices, and gave one half to the informer and the other half in aid of the poor rates. Upon this declaration the plaintiff would be bound to prove that the defendant supplied goods for the use of the workhouse, or for the support of the poor generally; and that is an offence which is not touched by the 4 & 5 Wm. 4, c. 76.

(*a*) 3 B. & Ald. 145. 147.

BRAMWELL, B.—I am of the same opinion. The 55 Geo. 3, c. 137, imposed a penalty of 100*l.* upon any parish officer who should, either in his own name, or in that of any other person, supply, for his own profit, goods, materials, or provisions for the use of any workhouse, or otherwise for the support and maintenance of the poor of the parish. Whether rightly or wrongly decided, it was held, in *Proctor* v. *Manwaring* (*a*), that the enactment did not apply to the case of a parish officer who supplied goods to an individual pauper.

Then came the Act popularly called the New Poor Law Act (4 & 5 Wm. 4, c. 76), which distinctly recognized the existence of the prohibition in the 55 Geo. 3, c. 137; for it enacts, by the 51st section, that the penalty imposed by the 6th section of the 55 Geo. 3, c. 137 shall apply to every Commissioner and parish officer to be app inted under the 4 & 5 Wm. 4, c. 76; so that it is clear that the 6th section of the former Act is not repealed by the latter Act. It then goes on, by the 77th section, to provide that any parish officer who, for his own profit, shall supply goods to an individual pauper shall be subject to a penalty of 5*l.*

It is immaterial whether *Proctor* v. *Manwaring* (*a*) was rightly decided; for if it was the legislature has recognised it and created a new offence; if it was not the 77th section of the 4 & 5 Wm. 4, c. 76 has repealed the 6th section of the 55 Geo. 3 so far as it applied to a supply of goods to an individual pauper.

The mistake in supposing that the 6th section of the 55 Geo. 3, c. 137, is altogether repealed has arisen from the quære appended by the reporters to the marginal note of the case of *Henderson* v. *Sherborne* (*b*). If the quære had been whether if that clause applied to such a supply as was the subject of the action in that case, it was repealed quoad

(*a*) 3 B. & Ald. 145. (*b*) 2 M. & W. 236.

1866.

ROBINSON v. EMERSON.

that supply, it would have been free from objection; but the quære is whether there was a general repeal of the clause. In *Henderson* v. *Sherborne* Lord *Abinger* said that if the New Poor Law Act embraced that particular case, it would in effect repeal the former enactment. He never suggested that there would be a repeal of that enactment generally, but only so far as it applied to a supply of goods to a individual pauper. This seems to me a clear case, and the plaintiff is entitled to judgment.

Judgment for the plaintiff.

April 17.

PEARCE and Another *v.* BROOKES.

To a count for the hire of a brougham the defendant pleaded that at the time of the alleged agreement she was, to the plaintiffs' knowledge, a prostitute; that the agreement was for the supply of a brougham which, to the plaintiffs' knowledge, was to be used by the defendant to assist her in her immoral vocation; and that the agreement was made by the plaintiffs in the expectation of payment out of the defendant's receipts as a prostitute. (The jury having found that the brougham was supplied by the plaintiffs with the knowledge that it was to be used by the defendant as part of her display to attract men).—*Held*, that the last averment in the plea need not be proved, the other averments constituting a good defence without it.

THE first count of the declaration set out verbatim an agreement (see *post*, p. 359) for the supply of a brougham by the plaintiffs to the defendant "on hire" with an option of purchase as therein specified, averring that before payment of a second instalment of the purchase money the defendant returned the brougham: breach, that the defendant did not pay a forfeiture of fifteen guineas, as provided by the agreement.

The second count was for money payable for the hire of a brougham.

Third plea to first count.—That at the time of the making of the supposed agreement the defendant was, to the knowledge of the plaintiffs, a prostitute, and that the supposed agreement was made for the supply of a brougham to be used by the defendant as such prostitute, and to assist her in carrying on her said immoral vocation, as the plain-

tiffs, when they made the said agreement, well knew, and in the expectation by the plaintiffs that the defendant would pay the plaintiffs the monies to be paid by the said agreement out of her receipts as such prostitute.

A similar plea was pleaded to the second count.

At the trial, before *Bramwell*, B., at the London Sittings after Michaelmas Term, 1865, it appeared that the following agreement had been made between the defendant, a prostitute, residing in Pimlico, and the plaintiffs, carrying on business in copartnership as coachbuilders in Long Acre:—"Memorandum of agreement, made this 4th day of May, 1864, between Mrs. Brookes, of No. 14, Westmoreland Place, Pimlico, and Pearce & Countze, coachbuilders, of Long Acre."

"Pearce & Countze have agreed to supply Mrs. Brookes with a new miniature brougham on hire until the whole of the purchase price of 135 guineas is paid, and which is not to exceed a period of twelve months; and the said Mrs. Brookes has agreed to hire the same, with the option to purchase as aforesaid, and pay down 50*l.* and the balance with 5 per cent. interest thereon by instalments periodically, so as to complete the purchase within the twelve months: and in case the brougham should be returned on the hands of Pearce & Countze before a second instalment is paid, it is understood that a forfeiture of fifteen guineas is to be paid in addition to the above 50*l.*, and also any damage which may arise to the carriage, except such as is occasioned by fair wear."

"Signed May 6, 1864," "Mrs. Brookes."

"50*l.* received as agreed herein."

"Pearce & Countze."

The deposit was paid by the defendant on signing the agreement. The signature of the defendant was written by her illegibly, and at the trial she swore that she could

1866.
PEARCE
v.
BROOKES.

neither read nor write more than her own name, but the jury negatived a plea of fraud on which she relied to avoid the agreement.

It also appeared that on making the agreement the defendant had given verbal directions for certain ornamental fittings to the brougham, and among other things that the inside should be fitted up with a glass mirror; and these directions the plaintiffs had carried out.

The defendant kept the brougham for some months and then returned it to the plaintiffs, not having paid a second instalment.

Evidence was adduced by the defendant of the circumstances attending the making of the agreement, as shewing that the plaintiffs, when they made it, knew the defendant to be a prostitute; and the jury expressed themselves satisfied that this was proved.

In support of the last allegation in the plea, viz., as to the source from which the plaintiffs expected payment no proof was offered. The learned Judge ruled, however, that that allegation was immaterial, and need not be proved, and left to the jury the following questions:—First, did the defendant hire the brougham for the purpose of her prostitution? Secondly, if she did, did the plaintiffs know the purpose for which she hired it?

The jury found that the brougham was used by the defendant as part of her display to attract men, and that the plaintiffs knew, when they supplied it, that it was to be used for that purpose; and the learned Judge thereupon directed the verdict to be entered for the defendant, with leave to the plaintiffs to move to enter a verdict for fifteen guineas.

Montagu Chambers, in last Hilary Term, obtained a rule nisi accordingly on the following grounds:—That the

defendant did not prove such allegations in the third plea as were essentially necessary to be proved to constitute a good defence to the action. That the defendant did not prove that the brougham sold to her by the plaintiffs was to be used by her as a prostitute, and was to assist her in carrying on her said immoral vocation; or that the plaintiffs made the agreement sued upon with such knowledge, or in the expectation that the defendant would pay the plaintiffs out of her receipts as such prostitute.

Seymour (*Beresford* with him) now shewed cause.—First, there was evidence to support the finding of the jury. Although there was no direct evidence of the defendant's purpose in hiring the brougham, the jury were entitled to apply the knowledge which, in common with the rest of the world, they possessed of the probable purpose for which an illiterate prostitute would require such an article. By the help of that knowledge they might infer not only what the defendant's purpose was, but also, that the plaintiffs, knowing her to be a prostitute, were aware of her purpose.—Secondly, assuming the evidence sufficient to support the finding of the jury, the plea was proved, since the last averment was not material. The averments, that the defendant was to the plaintiffs' knowledge a prostitute, and that the article supplied was to their knowledge supplied to be used for the purpose of her prostitution, make a good plea without the other averment. *Crisp* v. *Churchill*, cited in *Lloyd* v. *Johnson* (*a*); *Appleton* v. *Campbell* (*b*). The language of Lord *Ellenborough*, in *Bowry* v. *Bennett* (*c*), does not shew the contrary, since the expressions there used merely illustrate the case under discussion, and do not lay down a

(*a*) 1 Bos. & P. 340, 341.
(*b*) 2 C. & P. 347.
(*c*) 1 Camp. 348.

1866.
PEARCE v. BROOKES.

general rule. In that case the articles sold were cloth and it could not be said, as here, that they were sold be used for the purpose of prostitution.

Montagu Chambers and *T. O. Griffits* in support of rule.—The averments in the plea are all material, and first, viz., that the defendant was, to the plaintiffs' knowle a prostitute, alone was proved. Lord *Ellenborough's* opin in *Bowry* v. *Bennett* (*a*), is express that that is insufficie avoid the contract. The plaintiffs contend, both on au rity and principle, that, where the subject-matter of contract, though capable of being applied to an unla purpose, is also capable of being applied to a purpose t is lawful, and the contract itself does not contain a unlawful stipulation, there is nothing to avoid the contr on the score of illegality. That a brougham may applied even by a prostitute to an innocent purpose obvious, and if so, it is no concern of the other party the contract that she may also apply it to a purpose that immoral. The line on this subject must be drawn bro without entering into fine distinctions. In *Lloyd* v. *Jo son* (*b*) the action was against a prostitute for the amo of her washerwoman's bill, the articles washed consist principally of expensive dresses and gentlemen's nightc but *Buller*, J., held the whole amount recoverable, say that it was impossible for the Court to take into cons ration which of the articles were used for an unla purpose and which were not. The defendant contends a rule, the adoption of which would necessarily impede operations of trade. Its effect would be, wherever subject-matter of sale was capable of being applied to unlawful purpose, to entail a risk on the seller, if

(*a*) 1 Camp. 348. (*b*) 1 Bos. & P. 340.

smallest doubt existed as to the lawfulness of the purchasers' intentions. Put this case: A. sells barley to B.; B. intends to convert it into malt without paying the duty, and A. knows there is a possibility that B. will do so, is the mere knowledge of that possibility to affect the validity of the sale? The mere knowledge of an illegality over which a man has no control cannot constitute participation in it. To constitute participation here it should have been averred and proved, as was pointed out by Lord *Ellenborough* in *Bowry* v. *Bennett* (*a*), that "the plaintiff expected to be paid from the profits of the defendant's prostitution." The defendant must contend that a cabman who is hired by a prostitute to convey her to a house of ill fame cannot sue for his fare. Suppose that after hiring the brougham the defendant had ceased to be a prostitute, and had subsequently applied the brougham to a lawful purpose, could the plaintiffs have demanded back the brougham on the ground that the contract was illegal? Lastly, the finding of the jury that the user of the brougham was for the purpose of display is not equivalent to a finding that it was for the purpose of prostitution.

POLLOCK, C. B.—We are all of opinion that this rule should be discharged. Since the case of *Cannan* v. *Bryce* (*b*) in the Court of Queen's Bench, and *McKinnell* v. *Robinson* (*c*) in this Court, I take it to be a settled rule that, where a person contributes to the performance of an illegal act, knowing that what he contributes is intended to be so applied, he cannot recover the price of it by action. The notion that, in order to defeat such a claim as that set up, it is incumbent on the defendant to prove that the plaintiff expected to be paid out of the fruits of the ille-

(*a*) 1 Camp. 348. (*b*) 3 B. & Ald. 179.
(*c*) 3 M. & W. 434.

1866.
PEARCE
v.
BROOKES.

gality is certainly not law at the present day, and, if it were worth while to pause and examine further, I am strongly disposed to think it would turn out that it never was so. Whether the act be illegal or simply immoral can make no difference, the maxim applying equally in both cases—*ex turpi causâ non oritur actio.* If, therefore this article was furnished by the plaintiffs for the purpose of enabling the defendant to make that display which was favourable to her immoral purposes, that was a transaction out of which no cause of action could arise. I cannot agree with Mr. *Chambers* that in a case of this kind there is a necessity for that minute exactness in the proof and findings of the jury which, even where it is repulsive to decency, may be essential in a criminal case. I think it enough that there should be evidence to satisfy the jury of the nature of the defendant's vocation, and of the plaintiffs' knowledge that the article which they supplied was intended to facilitate her success in it; and, although the jury have not, by their verdict, adopted the exact expressions of the plea, I think that they have expressed everything that is necessary to support it.

MARTIN, B.—I am of the same opinion. The question is, was enough of the plea proved to constitute a defence to the action. The plea contains three averments. First, that the defendant was, to the knowledge of the plaintiffs, a prostitute; secondly, that the brougham was knowingly supplied to assist her in her immoral vocation; thirdly, that the plaintiffs expected to be paid out of the proceeds of her prostitution. That, in my judgment, is a good plea without the last averment, which, therefore, need not be proved. When it was proved that the defendant was to the knowledge of the plaintiffs, a prostitute, and that, to their knowledge, the brougham was hired for the purpose of display—which conveys very intelligibly that it was to aid

and assist the defendant in carrying on her trade of prostitution—I think the plea was, in substance, proved, and on that ground that this rule should be discharged.

As to the case of *Cannan* v. *Bryce* (*a*), to which reference has been made during the argument, my judgment not being based on the authority of that case, it is not necessary that I should express an opinion upon it.

PIGOTT, B.—I am of the same opinion. The maxim *ex turpi causâ non oritur actio* embodies the rule of law that is applicable, and the only doubt that I entertained when the rule was moved for was whether the evidence was sufficient to support what is material in the plea. On consideration I think it sufficient. The first allegation in the plea being proved, the jury, in considering the second, were entitled to call in aid their knowledge of the world and its usages. If a woman who is known to be a prostitute requires an ornamental brougham, there can be little doubt that she requires it for the purpose of plying her illicit trade; and that, in effect, the jury found. Then comes the question as to the materiality of the last allegation. To constitute a *turpis causa* is it essential that the plaintiffs should have looked for payment to the proceeds of the defendant's prostitution? I think not. If on the mere ground that the parties were silent as to the mode of payment the law were to support this contract, it would indeed be blind; for such matters are rarely expressed. As to the case of *Bowry* v. *Bennett* (*b*), Lord *Ellenborough* is not there laying down a general rule, but merely pointing out, by way of illustration, what, under the circumstances of the case before him, would be sufficient evidence that the plaintiff had done an act in furtherance of immorality.

(*a*) 3 B. & Ald. 179. (*b*) 1 Camp. 348.

1866.
PEARCE
v.
BROOKES.

BRAMWELL, B.—I am of the same opinion. The defen ant was a prostitute, and the plaintiffs knew it, as the ju found on ample evidence. The main question theref is, whether there was any evidence of the purpose for whi the brougham was let and hired. Of the defendant's pu pose there was, I think, evidence. The jury, in consid ing that question, had a right to apply their knowled of the affairs of life, and to infer, as they did, that t brougham was hired by the defendant for the purpose her "display," and that the plaintiffs knew it. But granti that this, or in other words the pursuit of her calling, w the defendant's purpose, can it also be truly said to ha been the plaintiffs? In one sense it cannot; for th purpose no doubt was to obtain the hire of the brougha while as to the use made of it they were most like indifferent. Put this case. A man buys a pair of duelli pistols from a gunsmith, declaring his intention to be fight a duel with them. The gunsmith says:—"I ca not to what purpose you put them: my purpose is simp to sell an article of trade." Is he precluded from recoveri the price, as having sold for an illegal purpose? Ap from authority it might be doubtful. But, as authoriti the cases of *Cannan* v. *Bryce* (*a*) and *McKinnell* v. *Robi son* (*b*) are conclusive that, in order to defeat such a clai as that set up, there is no necessity that it should ha formed a part of the bargain between the parties that t subject-matter of their bargain should be illegally applie Regarding this question, therefore, not as a matter of re soning, but as governed by the authorities which I ha mentioned, I think that when it was proved that t defendant was a public prostitute, and that to the plaintif knowledge she hired the brougham for the purpose of h

(*a*) 3 B. & Ald. 179. (*b*) 3 M. & W. 434.

prostitution, enough of the plea was proved to constitute a good defence to this action.

As to the last allegation in the plea, I stated at the trial that in my judgment it need not be proved, and I will only add that we are not overruling anything in *Bowry* v. *Bennett* (*a*) by so holding. The expressions of Lord *Ellenborough*, which have been relied on for the plaintiffs, were obviously not used with the view of laying down a general rule. The plea which was upheld in *McKinnell* v. *Robinson* (*b*) contained no allegation that the plaintiff looked for repayment to the proceeds of the illegal winnings. Take the case suggested during the argument of a man and woman being taken in a cab to a known house of ill fame. Can the cabman's right to sue for his fare depend on which hired the cab? The plaintiffs must contend that it may, since the woman only can be expected to pay from the proceeds of her prostitution. But whichever be the hirer of the cab the same thing is done, and with the same purpose; and how can it be lawful if done by the man, and, if done by the woman, unlawful? On these grounds I think the last averment unnecessary, and, consequently, that there was no need to prove it.

Rule discharged.

(*a*) 1 Camp. 348.

(*b*) 3 M. & W. 434.

1866.

April 30.

EDWARD CAVELL and Another *v.* PRINCE.

To an action on a covenant, in consideration of marriage, to pay an annuity during the life of the husband, the defendant pleaded, as a defence on equitable grounds, that the marriage was null and void by reason of the impotence of the husband.—*Held*, a bad plea.

DECLARATION.—For that the defendant, by deed, dated, &c., covenanted with the plaintiff that if a marriage then intended to be solemnized between one John Cavell and one Caroline Prince should be solemnized, he, the defendant, would, so long as he should live, pay to the said John Cavell during his life, or until he should become bankrupt or an insolvent debtor within the meaning of some Act of Parliament for the relief of Insolvent Debtors, an annuity or yearly sum of 200*l.* by equal half yearly payments in every year, without any deduction, the first of such payments to be made at the expiration of six calendar months from the day of the solemnization of the said marriage, if the said annuity should so long continue. Averments: that the said intended marriage was afterwards solemnized between the said John Cavell and the said Caroline Prince, to wit, on &c., and that the said John Cavell is still living, and has not become bankrupt or an insolvent debtor within the meaning of any act of parliament for the relief of insolvent debtors, and that the said annuity still continues. And that of the said annuity the sum of 200*l.*, being the amount of two half yearly payments thereof, is due and unpaid.

Plea.—For defence on equitable grounds, the defendant says that the said deed was made by the defendant in consideration of the marriage of the said John Cavell with Caroline Prince, the daughter of the defendant, and of such marriage being a valid marriage, and of the said John Cavell being competent to contract the said marriage, whereas in truth and in fact the said marriage was not a valid marriage, nor was the said John Cavell competent to contract the same, but the said marriage always was null and

void by reason of the impotence of the said John Cavell, of which the defendant had no notice at the time of making the said deed: and the defendant's said daughter has never been able to live and cohabit with the said John Cavell by reason of his said impotence, and has never lived or cohabited with him for the reason aforesaid, and the consideration for making the said deed wholly failed as aforesaid.

Demurrer, and joinder therein.

Keane (*Haselfoot* with him), in support of the demurrer.—The plea discloses no defence either at law or in equity. Impotence is a canonical impediment, which renders the marriage voidable not void, and it is valid for all civil purposes until sentence of nullity has been pronounced by a Court of competent jurisdiction: Bishop on Marriage and Divorce, vol. 1, chap. xix. §. 339. 4th ed. Besides, a marriage duly solemnized can only be impugned on the ground of impotence by one of the parties, not by a third person: Boehmeri Principia Juris Canonici, par. 384 (*a*), ed. 1785.

The Court then called on

Beresford to support the plea.—In order to determine

(*a*) The passage is as follows:—" Impedimenta dirimentia privata descendunt (I.) ex *metu* (II.) ex *dolo* (III.) ex *errore* circa personam, vel circa statum ejus civilem (IV.) ex *impotentia* cœundi antecedenti absoluta et perpetua. Hujus probatio non peragitur confessione conjugis, sed inspectione oculari per peritos instituenda: ex qua si definiri satis nequit perpetummne an temporarium impedimentum medicamentis vel mora tollendum, tum ad triennii experimentum est excurrendum, ut si per id tempus, a contractis nuptiis computandum, nullo successu ad venerem nitantur, post triennium matrimonium dissolvatur, dummodo impotentia confirmetur juramento conjugis, vel utriusque si impotens eam non diffitetur, vel saltim actoris si impotens contradicit. *Ceterum ob impedimentum dirimens privatum non nisi ei cujus interest jus agendi competit: eoque juri suo renunciante matrimonium convalescit et subsistit.*"

1866.
CAVELL v. PRINCE.

whether the plea is good, it is necessary to ascertain what is the real contract between the parties. The consideration for the payment of the annuity was not the mere solemnization of the marriage, but its consummation. In the case of *B——n* v. *B——n* (*a*), which was a petition for nullity of marriage by reason of the husband's impotence, Dr. *Lushington*, in delivering judgment, said: "It is a mistake to assert that Ecclesiastical Courts annul marriages in cases like the present, for those marriages are in themselves, ab initio, void." In the case of *H.* falsely called *C.* v. *C.* (*b*) *Bramwell*, B., said: "There seems some uncertainty whether such marriages are absolutely null or only voidable. Dr. *Lushington*, in both reports of *B.* v. *B.*, is express that they are null; some older writers seem to say that they are only voidable by decree of nullity; the difference may be this that they are valid at common law unless avoided—null by the law ecclesiastical." [*Pollock*, C. B.—In *Hall* v. *Wright* (*c*) the majority of the Court of Exchequer Chamber held that if a man became impotent after a promise to marry, the woman might insist upon his performing his promise. I entirely dissent from that doctrine. When parties enter into the ordinary contract of marriage it is an implied condition that they are capable of consummating it. *Martin*, B.—The plea is clearly bad. It does not allege that the woman has elected to avoid the contract of marriage. It is a plea in confession and avoidance; it admits the solemnization of the marriage, and in order to render the plea good it ought in some way to shew that the marriage has become void.]

PER CURIAM (*d*).—There must be judgment for the plaintiff.

Judgment for the plaintiff.

(*a*) 1 Spink's Eccl. and Adm. Rep. 248. 250.
(*b*) 1 Sw. & Tri. 605. 622.
(*c*) E. B. & E. 746.
(*d*) *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Pigott*, B.

1866.

RAYMENT *v.* MINTON.

April 30.

To an action against a master for a breach of covenant in not teaching his apprentice, it is a good plea, that the apprentice would not be taught and by his own wilful acts hindered and prevented his master from teaching him.

DECLARATION.—For that, by an indenture of apprenticeship, dated, &c., one H. Page, therein described as the son in law of the plaintiff, of his own free will and accord, and by and with the consent and approbation of the plaintiff, did put himself apprentice to the defendant to learn the art, trade or business of a builder, ornamental painter and decorator, and with him, the defendant after the manner of an apprentice to serve from the 18th February 1864, until the full end and term of five years from thence next following; and the defendant did, by the said indenture, covenant and agree with the plaintiff to teach the said apprentice in the said art, trade or business of a builder, ornamental painter and decorator, which he, the defendant, then used by the best means in his power, the defendant finding unto the said apprentice good and sufficient meat, drink, lodging and all other necessaries during the said term of five years, the plaintiff paying unto the defendant the sum of 29*l.* at or before the execution of the said indenture; and for the true performance of all and every the covenants and agreements contained therein the parties thereto bound themselves by the said indenture.—Averments: that at or before the execution of the said indenture he, the plaintiff, did pay to the defendant the said sum of 29*l.* as therein expressed, and that, after the making thereof, the said Henry Page entered into the service of the defendant with him after the manner of an apprentice to serve for the term and in the manner aforesaid. And that he, the said apprentice, has always performed all things in the said indenture contained on his

1866.
RAYMENT v. MINTON.

part to be performed, and has not done anything in the said indenture forbidden to do; and all conditions were performed, and all things happened and were done both by the plaintiff and by the said apprentice, and all times elapsed necessary to entitle the plaintiff to a performance of the said covenants of the defendant, and to have the said apprentice taught by the defendant as aforesaid, and nothing happened or was done to prevent the plaintiff from maintaining this action for the breach of the said covenant hereinafter alleged: Yet the defendant did not nor would, after the making of the said indenture and during the said term, or the part thereof already elapsed, teach the said apprentice in the said art, trade, or business of a builder, ornamental painter and decorator, but wholly failed, neglected and refused so to do.

Plea.—That at the time of the said alleged breach the said apprentice would not be taught, and by his own wilful acts hindered and prevented the defendant teaching him, the said apprentice, in the said art, trade or business of a builder, ornamental painter and decorator by the defendant used, and then, by his said acts, caused the said breach to which this plea is pleaded.

Demurrer, and joinder therein.

Goddard, in support of the demurrer.—The plea confesses the defendant's breach of covenant in not teaching the apprentice, and sets up as an answer the refusal of the latter to be taught. But the covenants in an apprenticeship deed are mutual and independent, and the misconduct of the apprentice may entitle the defendant to maintain an action, but does not discharge him from his covenant to teach. *Winstone* v. *Linn* (*a*), *Phillips* v. *Clift* (*b*). The case differs from the contract between master and servant

(*a*) 1 B. & C. 460. (*b*) 4 H. & N. 168.

where obedience on the part of the servant is a condition precedent to the master's liability to pay him. [*Martin*, B.—In Addison on Contracts, p. 440, 4th ed., it is said: —"But if the apprentice is guilty of such an amount of misconduct as renders it impracticable for the master to maintain, employ and teach him, according to the terms of the indentures, the master cannot be sued for neglecting to perform his covenants in that behalf, inasmuch as the capability of the apprentice to be instructed, maintained and provided for by the master is naturally a condition precedent to the liability of the latter upon such covenants." For that position *Mercer* v. *Whall* (*a*) is cited.] If an apprentice misbehaves himself the master has the power of correcting him by personal chastisement: per *Watson*, B., in *Phillips* v. *Clift* (*b*). [*Martin*, B.—How is it possible to teach an apprentice if he will not be taught?] For aught that appears by the plea the master might have enforced obedience by lawful punishment. In *Phillips* v. *Clift* (*b*) the plea alleged that the apprentice defrauded and robbed the defendant, so that it became unsafe for the defendant to continue him in his service, and it was held that the defendant was not justified in dismissing him. This plea ought to have alleged that the apprentice absented himself or wholly put it out of the power of the defendant to teach him.

Grantham, in support of the plea, was not called upon to argue.—He referred to *Hughes* v. *Humphreys* (*c*).

POLLOCK, C. B.—I am of opinion that the defendant is entitled to judgment. If an apprentice will not be taught,

(*a*) 5 Q. B. 447. (*b*) 4 H. & N. 168.
(*c*) 6 B. & C. 680.

1866.
RAYMENT
v.
MINTON.

and by his wilful acts hinders and prevents his master fro teaching him, it is evident that the master is not liable.

MARTIN, B.—I am also of opinion that this plea is goo The master covenants to teach the apprentice in the "ar trade or business of a builder, ornamental painter an decorator *by the best means in his power*." Common sen points out that if the apprentice will not be taught, and b his own wilful act hinders and prevents his master fro teaching him, the master is not liable. It is a necessa condition precedent that the apprentice should be willi to be taught. Suppose the master, in order to instruct t apprentice in the mode of building, requires him to ascen a ladder, and he absolutely refuses, and resolutely stan upon the floor, how can the master be liable for a brea of covenant when the apprentice, by his own act, rende it impossible to teach him? Common sense and reas point out that it must be a condition precedent that t apprentice should allow himself to be taught.

BRAMWELL, B., and PIGOTT, B., concurred.

Judgment for the defendant.

1866.

COOMBES *v.* DIBBLE.

May 8.

An agreement by two persons that each shall race his horse against that of the other, and that the winner shall have both horses, is null and void by the 8 & 9 Vict. c. 109, s. 18, as an agreement by way of gaming or wagering, and is not a subscription or contribution, or agreement to subscribe or contribute, for or toward any prize within the meaning of the proviso of that section.

TROVER for a horse.

Pleas: not guilty and not possessed.

At the trial, before *Byles*, J., at the last Somersetshire Spring Assizes, it appeared that the plaintiff and defendant, being each possessed of a horse, after some conversation as to the respective merits of their horses, signed the following agreement:—

"Banwell, October 14th, 1865.

"Memorandum of an agreement, between Mr. Thomas Coombes, of the one part, and Alfred Dibble, of the other part.

"Both agrees (*a*) to run one's horse against the other's which shall have the two, from the mill to Mr. Bowering's.

"Alfred Dibble.

"Thomas Coombes.

"The distance is altered to be down and back to the 'Ship' Inn, Banwell.

"Thomas Coombes.

"Witness to both signatures, H. Phippen."

The plaintiff and defendant accordingly rode the race, and the defendant's horse won. The defendant afterwards obtained possession of the plaintiff's horse, alleging that he had fairly won it. There was conflicting evidence as to whether the plaintiff had voluntarily given up the horse, or whether the defendant had taken it without the consent and against the will of the plaintiff, but no question was left to the jury on this point.

It was submitted, on behalf of the plaintiff, that the

(*a*) Sic.

1866.
COOMBES v. DIBBLE.

agreement was void, by the 8 & 9 Vict. c. 109, s. 18, and therefore no property in the plaintiff's horse passed to the defendant.

The learned Judge left it to the jury to say, first, whether the agreement was entered into; secondly, whether the race was fairly won by the defendant's horse. The jury found both questions in the affirmative, and thereupon the learned Judge directed a verdict for the defendant, reserving leave to the plaintiff to move to enter the verdict for him, with 14*l.* damages, the value of the horse, the Court to be at liberty to draw inferences of fact.

Prideaux, in the present Term, obtained a rule nisi accordingly; against which

Edlin now shewed cause.—The question is, whether the agreement is void by the 8 & 9 Vict. c. 109, s. 18 (*a*). The first part of that section renders null and void all contracts by way of gaming or wagering. Then follows a proviso that the "enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise." This case comes within the proviso. Each party agreed to stake his horse on the

(*a*) Sect. 18 enacts:—"That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

event of the race, the winner to have both horses; therefore there was a contribution, or agreement to contribute, towards a prize to be awarded to the winner of a lawful game. A horse race is legal, whether it takes place upon a public course or not. Moreover, in this case each party rode his own horse, so that there was a trial of the skill of the riders as well as of the speed of the horses. *Evans* v. *Pratt* (*a*) closely resembles this case. There *Tindal*, C. J., said:—"This, as appears from the record, is a race between two horses, to be run from a certain given point to a certain other given point—a trial of the skill of the riders and of the strength and speed of the horses—and the parties to the contract being the respective owners of the horses, which avoids the difficulty suggested as to its being a mere wager." The fact that the horses constituted the prize does not render this an invalid contract any more than if the horses had been valued, and their worth in money staked. Nor does it make any difference that only two persons contributed to the prize. In *Batty* v. *Marriott* (*b*) it was held that a foot race which two persons had agreed to run was legal. There *Wilde*, J., and *Coltman*, J., were of opinion that, though a stake by two persons only might be a wager, the transaction was rendered legal by the proviso in the 8 & 9 Vict. c. 109, s. 18. And *Cresswell*, J., said:—"You cannot, from the words only, infer any limit to the number of subscribers or contributors. Though there are two subscribers only, it is not the less a contribution to a sum to be awarded to the winner of a lawful game, if the agreement be that the whole sum subscribed shall be paid over to the winner." Here, by the terms of the agreement, the entire contribution is to be handed over to the winner. [*Martin*, B.—In *Batty* v. *Marriott* (*b*) *Cresswell*, J., said that the proviso was manifestly intended

(*a*) 4 Scott N. R. 378. 391. (*b*) 5 C. B. 818.

1866.
COOMBES v. DIBBLE.

to apply to a contribution to sweepstakes, but I shoul have thought that what the legislature intended to excep was a subscription or contribution of money for plate o other prize to be awarded to the winner of a race. *Polloc* C. B.—The observations of *Cresswell*, J., are confined to subscription or contribution of *money*.] The proviso relat to plate or some article to be purchased by the subscriptio or contribution of money, or agreement to subscribe contribute money. [*Bramwell*, B.—Suppose one of the persons had a salver and another a cup, and they agreed stake the one against the other, would that be legal? I suppose two farmers contributed ten quarters of wheat ea as a prize.] Those cases would be within the principle the decision in *Batty* v. *Marriott* (*a*).

Prideaux appeared to support the rule, but was not call upon to argue.

POLLOCK, C. B.—Upon the best consideration which can give the statute, 8 & 9 Vict. c. 109, s. 18, I am o opinion that the rule ought to be absolute. The questio arises thus:—Two persons, being each possessed of a horse agree to ride a race together, and that the winner shal have both horses. There is no deposit of a stake, whic the winner is to receive; but the owners of the horse simply agree that they will run one against the other, an whoever wins shall have both horses. Mr. *Edlin* contend that there has been a subscription or contribution by each or agreement to subscribe or contribute, for or toward prize to be awarded to the winner. I think that, unle an extremely strained construction be put upon the wor of the enactment, no one can come to that conclusio It is impossible altogether to dissociate the view of the a

(*a*) 5 C. B. 818.

of parliament from the circumstances essentially connected with the subject-matter of it. I do not mean to say that by no possibility could any person having a reasonable acquaintance with the English language put upon the statute the construction contended for, but I should be surprised if anyone familiar with horse racing should think that if two persons agree to run the horse of each against the other, that is, within the words of the proviso, a "subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner." It seems to me that it would be like confounding barter with sale. In my opinion the enactment refers to a subscription or contribution of money. It may be, however, that if a number of persons contributed certain articles which were deposited with a stakeholder to be handed over to the winner of the race, that would be within the proviso. But it cannot be said that a couple of horses which are striving against each other to win the race are a subscription or contribution "towards any plate, prize or sum of money." I think that the framers of this enactment could never have intended that the case of two persons riding a race for the horses on which they rode should be within the proviso.

MARTIN, B.—I am of opinion that this case falls within the first part of the 18th section of the 8 & 9 Vict. c. 109, and not within the proviso. That section enacts "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void." This is a contract in writing (and I think a wager in the ordinary sense of the word), by which two persons agree that the horse of the one shall run against the horse of the other, and that the owner of the winning horse shall

1866.
COOMBES v. DIBBLE.

have both. The section proceeds to enact "that no s shall be brought or maintained in any Court of law equity for recovering any sum of money or valuable th alleged to be won upon any wager, or which shall h been deposited in the hands of any person to abide t event on which any wager shall have been made." No the horse alleged to have won, was a "valuable thing and if it, or its value (14*l.*), had been deposited in t hands of a stakeholder to abide the event of the wager, could not have been recovered. Then comes the proviso the 18th section, "that this enactment shall not be deem to apply to any subscription or contribution, or agreem to subscribe or contribute, for or toward any plate, pri or sum of money to be awarded to the winner or winn of any lawful game, sport, pastime or exercise." I sho be content to accept as law the judgment of the Court Common Pleas in *Batty* v. *Marriott* (*a*), it being the ju ment of a Court of co-ordinate jurisdiction; but in t case there was no "subscription or contribution, or agr ment to subscribe or contribute." The agreement was t each should ride his own horse, and that the horse of loser should become the property of the winner. If suit could be maintained for the horse, the defendant l no right to take it, and therefore, upon the evidence ought to have been left to the jury to say whether horse was taken against the consent of the plaintiff, voluntarily handed over by him to the defendant, for if it cannot be recovered back.

BRAMWELL, B.—I am of the same opinion. It is c that the case is within the first part of the 18th sectio

(*a*) 5 C. B. 818.

the 8 & 9 Vict. c. 109, and the only question is whether it is within the proviso. As at present advised, I am satisfied with the decision in *Batty* v. *Marriott*, and accept it as law; but in my opinion this case is not within the proviso, and therefore not touched by that decision. I do not say that there may not be a "prize" consisting of a horse, or that a horse may not be "contributed" within the meaning of the proviso; but here there was no contribution by either of the parties of their horses. I do not think it was the intention of the legislature that such a case as this should be within the proviso; but that they contemplated a subscription or contribution, or agreement to subscribe or contribute, to plate or something else which should be a prize. That being so, the main question must be determined in favour of the plaintiff, viz., that the contract is null and void. But then the question remains whether the defendant lawfully got possession of the plaintiff's horse. That question has not been disposed of by the jury, and therefore I think there ought to be a new trial (*a*).

(*a*) At the suggestion of the Court the case stood over until the first day of the following Trinity Term in order that the parties might come to an arrangement, which they did.

1866.

April 25.

MANNING *v.* TAYLOR and Others.

A testator seised in fee of two undivided quarters of certain lands, before the 7 Wm. 4 & 1 Vict. c. 26 devised one of them as follows:—"I give to J. M. all my undivided quarter of three fields at lease to P. on three lives."—*Held*, that the devisee took an estate in fee.

EJECTMENT to recover an undivided fourth part of certain lands, called Castle Hayes, in the county of Devon. By consent and order of a Judge a case was stated for the opinion of this Court, without pleadings, (so far as material) as follows:—

Previously to the year 1799 the lands called Castle Haynes were held in undivided fourth parts, and in that year two of such fourth parts were purchased by one John Hellyer, who then became seised thereof in fee simple, subject only to certain leases for lives then subsisting but since determined.

John Hellyer, being so seised, by his will, dated the 23rd of April, 1801, devised (inter alia) as follows:—

"I give my daughter Mary the rents of my undivided quarter of the three Castle Hayes now rented by Mr. Benjamin Frickey at 20*l.* 16*s.* 8*d.* per year, to receive the said rent entirely to her own use notwithstanding her coverture, and immediately after her death I give my said undivided quarter of the said three Castle Hayes, in the parish of Plympton Maurice, to Joseph Lane, son of my said daughter Mary Lane.

"I give unto Joseph Manning, son of my daughter Elizabeth Manning, all my undivided quarter of three fields in the parish of Plympton Maurice, and are at lease to Miss Elizabeth Palmer on three lives; conventionary rent 13*s.* 4*d*; heriot, 16*s.* on each life dying; known and commonly called Castle Haynes, to be received by the said Joseph Manning, or his father for him.

"I give unto John Lane, that married my daughter

Mary Hall, 10*l.* I give unto Richard Manning, that married my daughter Elizabeth, 10*l.* And I appoint you, the said John Lane and Richard Manning, immediately after my death, to receive the rents of all I have given your children as it shall come into hand, to keep the house in good repair, and to pay for their schooling, clothing and binding them apprentice. To keep a just account, and as they attain each of them their full age of twenty-one years to pay to each of them the money due, and as honest men deliver up your charge."

The will also contained devises in the following terms: —"I also give him the said John Manning the high rent for my moiety of Wedgers Parks. I also give him the fee of my said moiety of Wedgers Parks immediately after the death of the lives now on it. I give unto William Lane, son of my said Mary, the conventionary rent of Chubb's tenement, now by Higman Sadler, of Dock, held by a lease from the Fortescues, of Vallapit, to Richard Morrish, of Plympton. I also give him, the said William Lane, the fee of the said Chubb's tenement."

The testator died in 1802. Joseph Manning entered into possession of all the lands devised to him, and in the year 1846, by his will, devised all his real and personal estate to his wife Mary absolutely.

Joseph Manning died on the 9th of September, 1846, leaving his wife and his only son, the plaintiff, him surviving. Upon the death of Joseph Manning the heirs at law of John Hellyer gave notice to the tenants of the undivided fourth part of Castle Hayes devised to Joseph Manning to pay to them the rents, and they have since been in receipt of the rents. The defendants have succeeded to all their rights in the premises.

Mary Manning died intestate in January, 1864, leaving

1866.

MANNING v. TAYLOR.

the plaintiff her only son and heir at law; and the writ in this action was issued on the 24th of November, 1864.

The question for the opinion of the Court is, whether, under the will, Joseph Manning, the father of the plaintiff took an estate in fee or an estate for life in the fourth part of Castle Hayes. If the Court shall be of opinion that he took the estate in fee, judgment shall be entered for the plaintiff. If the Court shall be of opinion that he took an estate for life, judgment shall be entered for the defendant.

Joshua Williams (*Anstie* with him), for the plaintiff.—This devise carries the fee simple. Although before the Wills Act, 7 Wm. 4 & 1 Vict. c. 26, s. 28, a devise of real estate without words of limitation gave the devisee an estate for life only, yet a devise of an undivided moiety of land, of which the testator was seised in fee, was held to pass the fee. [*Martin*, B.—In Jarman on Wills, vol. 2, p. 264, 3rd ed., it is said that it was at one time a question whether, under a devise by a testator of his "moiety," "part" or "share" the devisee would take an estate in fee, but it seems now settled that he will."] A gift of "an undivided quarter" is a gift of the fee simple in that quarter. In *Bebb* v. *Penoyre* (*a*) Lord *Ellenborough*, C. J., was disposed to think that the words "my half part" were sufficient to carry the fee; but it was unnecessary to decide the point. That case was followed by *Paris* v. *Miller* (*b*), where it was held that the words "my share" passed the fee, inasmuch as they were used as denoting the interest of the testator. That decision was recognised and adopted, in *Montgomery* v. *Montgomery* (*c*), by Sir *E. Sugden*, C., who held that under a devise of the testator's "part" of the

(*a*) 11 East, 160. (*b*) 5 M. & Sel. 408.
(*c*) 3 Jones & Lat. (Irish) 47.

lands the fee passed. In *Doe* d. *Atkinson* v. *Fawcett* (*a*) the Court of Common Pleas held that a devise of "my moiety" of a house carried the fee, on the ground that the words "my moiety" imported the *interest* which the testator had in the house, and not merely that he had no more than half of a house. [*Martin*, B.—It seems a strange rule of construction, that where a testator is the owner of the whole estate, and devises it without words of limitation, an estate for life only should pass, but where he is the owner of a moiety only, and devises that moiety, the devisee should take an estate in fee. Probably the Courts considered themselves bound by the rule that a gift of land simply gives an estate for life only, and were desirous of relaxing it.] The distinction, however, is well settled, and was acted upon in *Green* v. *Marsden* (*b*) by *Kindersley*, V.C., who held that a devise of "the five shares of the freehold and leasehold messuages or tenements" which belonged to the testator passed the fee. If this devise had been "my undivided four parts," &c., there could have been no question, and it makes no difference that the words are "my undivided quarters." The circumstance that the testator has elsewhere, in express terms, given the fee, does not alter the case. Where the word "estate" in a will is sufficient to confer the inheritance, its operation is not restrained by express words of limitation in another part of the will: *Ibbetson* v. *Beckwith* (*c*), *Uthwatt* v. *Bryant* (*d*), Jarman on Wills, vol. 2, p. 257, 3rd ed.

Mellish (*Lopez* with him), for the defendant.—If there had been a simple devise of an "undivided quarter" it might have passed the fee; but the circumstances that the rent is to be received during the minority of the devisee

(*a*) 3 C. B 274.
(*b*) 1 Drewry, 646.
(*c*) Cas. temp. Talbot, 157.
(*d*) 6 Taunt. 317.

1866.
MANNING v. TAYLOR.

by his father and afterwards by himself shews that the testator intended to give a life estate only. There is no provision for the receipt of rent after the death of the devisee. [*Martin*, B.—The testator seems to have thought that he had an estate in the rent distinct from the estate in the land.] Being possessed of a moiety of the land he has used the word "quarter," not to describe his interest in the land, but to limit the devise to one quarter. Whenever the testator intended the fee to pass he has in express terms devised it together with the rent. In *Doe* d. *Atkinson* v. *Fawcett* (*a*) the testator had a moiety only, and he devised the whole. [*Bramwell*, B.—The 7 Wm. 4 & 1 Vict. c. 26, s. 28, is a legislative recognition that the previous decisions were wrong.] The principle of the decision in the cases cited is that the testator intended to dispose of his whole estate.—He referred to Vin. Abridg. "Devise" (L. a), pl. 11.

Joshua Williams was not called upon to reply.

MARTIN, B.—I am of opinion that the plaintiff is entitled to judgment. In Jarman on Wills, vol. 2, p. 247, 3rd ed., the fundamental rule is thus laid down:—"Nothing is better settled than that a devise of messuages, lands, tenements or hereditaments (not estate), without words of limitation, occurring in a will which is not subject to the newly enacted rules of testamentary construction, confers on the devisee an estate for life only." And this is stated to be the rule, notwithstanding that, from a variety of circumstances, examples of which are given, a different intention might be inferred. The learned author proceeds to say:—"This rule of construction is entirely technical, as according to popular notions the gift of any subject simply

(*a*) 3 C. B. 274.

comprehends all the interests therein. A conviction that the rule is generally subversive of the actual intention of testators always induced the Courts to lend a willing ear whenever a plausible pretext for a departure from it could be suggested. Hence have arisen the various cases in which indefinite devises have been, by implication, enlarged to a fee simple." I think that nothing is to be found in the rest of the will which throws any light upon the testator's intention, and that the construction must be given upon the words of the clause containing the devise. Something may, however, be said as to the interest which the testator had in these lands. He had two undivided fourth parts expectant on the termination of three lives; so that, in fact, he had a reversion. Bearing that in mind, when he says "I give all my undivided quarter of three fields at lease on three lives, he devised his reversion in the undivided quarter. If he had used the words "all my reversion in that undivided quarter" it would have passed the fee, and the language now used ought to receive the same construction. Therefore, even without the case of *Doe* d. *Atkinson* v. *Fawcett*, I should have come to the conclusion that this devise passed the fee, but I cannot distinguish between the words "my moiety" and "my undivided quarter:" if the one will carry the fee the other will also.

BRAMWELL, B.—I am entirely of the same opinion. Without the authority of *Doe* d. *Atkinson* v. *Fawcett* I should have come to the conclusion that this must be a devise of all the estate which the testator had, because it is a devise of an undivided quarter of a reversion. The land being leased for lives, and the devisee being a minor, the testator directs that the rent shall be received during his minority by his father, evidently intending that the devisee

1866.
MANNING
v.
TAYLOR.

should have all the rent which would accrue under a demise of the reversion. But the case of *Doe* d. *Atkinson* v. *Fawcett* is in point, and concludes the matter.

PIGOTT, B.—I also think that the case of *Doe* d. *Atkinson* v. *Fawcett* is conclusive. It seems to me that it cannot be distinguished from this case, and I am glad that we are enabled to carry out the evident intention of the testator.

Judgment for the plaintiff.

April 23 & 30. MANGAN, an Infant, by JOHN MORGAN, his next Friend [redacted],
v. ATTERTON.

The defendant exposed in a market place a machine for crushing oil cake, without the handle being fastened or its being thrown out of gear, or in the care of any person. The plaintiff, a boy four years old, on returning from school under the care of his brother who was seven years old, stopped with other boys at the machine, and whilst one of them was turning the handle put his fingers in the cogs of the wheels, on being told by his brother to do so, and three of his fingers w[redacted]re crushed.—*Held*, that the defendant was not liable, as there was no negligence on [redacted]his part; and the injury was caused by the act of the plaintiff and the boy who turned [redacted]the handle.

THIS was an appeal from the direction of the Judge [redacted]f the County Court of Staffordshire holden at Lichfield.

The case stated that the particulars of demand were [redacted]s follows:—

This action is brought to recover the sum of 50*l.*: F[redacted]r that the defendant, on, &c., did negligently and careless[redacted]y expose, in a public street in the city of Lichfield, a certa[redacted]n machine, to wit, a cutting machine, and did then and the[redacted]e negligently and carelessly permit and suffer the said machi[redacted]e to be and remain in the said street for a considerable leng[redacted]h of time unprotected, and without having used ordinary a[redacted]d reasonable precaution and care: Whereby the plaintiff w[redacted]s much hurt and injured.

It was proved that the machine was a crushing machi[redacted]e for the purpose of crushing oil cake, having on one si[redacted]e

a set of cog wheels to work the rollers, through which the oil cake to be crushed would pass, and on the other side a handle, by which the wheels were set in motion.

The machine was standing, as usual, during the market hours, in the place where the defendant, who is a silversmith, displays, on a market day, articles which he has for exhibition or sale, being the public street near to the market place, and forming part of the ordinary market area in Lichfield.

The axle of the handle, which is easily turned, was at the height of two feet nine inches from the ground, and was not in any way fastened by any wire or string, which might have been easily done, and would have prevented the accident. The cogs, which are instantly put in motion by the handle, are, at the point where they meet, at the height of two feet six inches from the ground. The machine was not in any person's care.

The plaintiff, a boy four years old, was accompanied to and from school by his brother, who is seven years old, whom their mother was in the habit of entrusting with the care of him to and from school, a considerable distance, their way being past the place where the machine stood.

In returning from school the plaintiff and his brother, with other lads, stopped at the machine, and, whilst one of the other boys was turning the handle, the plaintiff, on being told to do so by his elder brother, put his fingers in the cogs, and three were crushed so severely as to require amputation.

On the trial the defendant asked for a nonsuit, upon the grounds, that the action was not maintainable against him: that other persons caused the accident: that there was no negligence in leaving such a machine untied or unguarded: that the plaintiff had contributed to the accident by his own act, and the defendant was not liable.

1866.
MANGAN
v.
ATTERTON.

The Judge told the jury that if they agreed with him in thinking that the machine was dangerous, and one that should not have been left unguarded in the way of ignorant people, and especially of children, without, at all events, the handle being removed or fastened up and the cog thrown out of gear, then they would hold the defendant liable for such damages as they might think right.

The jury, having inspected the machine, gave a verdict for the plaintiff, damages 10*l.*

Macnamara argued for the appellant (April 23).—The defendant is not liable on two grounds: first, he was not guilty of any negligence; and, secondly, the plaintiff by his own act brought the injury on himself. The machine was not in any sense dangerous if not touched. [*Martin*, B., referred to *Lynch* v. *Nurden* (*a*).] In that case the jury found that it was negligence in the defendant's servant to leave the horse and cart for half an hour unattended in a public street. That decision proceeded on the ground that the plaintiff had taken as much care as could be expected from a child of tender years, and that the defendant was the real and only cause of the mischief. But where a person by his own culpable conduct brings the mischief on himself he cannot recover: *Lygo* v. *Newbold* (*b*), *Singleton* v. *The Eastern Counties Railway Company* (*c*). There was no duty on the part of the defendant to take care that no one touched the machine; nor any more negligence than when a person rides in his carriage without a servant behind, and a child gets up and is injured. As observed by *Alderson*, B., in *Lygo* v. *Newbold* (*b*), "the negligence, in truth, is attributable to the parent who permits the child to be at large." This case is not distinguish

(*a*) 1 Q. B. 29. (*b*) 9 Exch. 302.
(*c*) 7 C. B. N. S. 287.

able from *Hughes* v. *Macfie* (*a*), where the plaintiff, a child of tender years, jumped from the lid of a cellar which the defendant had placed against a wall in a public street, when it fell upon him and injured him severely. Here, as in that case, the child voluntarily meddled, for no lawful purpose, with that which if left alone would not have hurt him.

A. S. Hill argued for the respondent (April 30).—The jury have, in effect, found that there was negligence on the part of the defendant, and the only question is, whether there was contributory negligence on the part of the plaintiff. No doubt, if the plaintiff and the boy who turned the handle of the machine had been playing together, the case of *Hughes* v. *Macfie* (*a*) would apply. But here there was no joint action between the two boys so as to render both guilty of negligence. That being so, contributory negligence is not a question for the jury in the case of a child of such tender years. [*Bramwell*, B.—Is there any negligence in placing a machine of this kind in a market place? Suppose it had been of such delicate construction that the child had broken it, might not the owner have maintained an action?]

POLLOCK, C. B.—We are all of opinion that there is no foundation for this action, and that our judgment must be for the appellant.

MARTIN, B.—I am of the same opinion. The plaint states that the defendant negligently and carelessly permitted the machine to remain in the street unprotected, whereby the plaintiff was injured. That is not so, for the

(*a*) 2 H. & C. 744.

1866.
MANGAN
v.
ATTERTON.

injury was directly caused by the act of the other turning the handle of the machine. Whatever neg there may have been in leaving the machine in condition as to afford the boy an opportunity of t the handle, it is far too remote to render the def liable for the injury done to the plaintiff. In my o the Judge ought to have told the jury that there negligence on the part of the defendant.

BRAMWELL, B.—I am also of opinion that our juc ought to be for the defendant. The word "neglige constantly misused. Suppose the defendant had sa will continue to place the machine in the market as b and did so, would that be wilful negligence? Or s he had painted it with some poisonous paint, a child had sucked it, would he have been liable? opinion he had a perfect right to exhibit his mach the market place, and he is not liable for injury by the plaintiff and his companion improperly me with it.

PIGOTT, B., concurred.

Judgment for the appell

1866.

PRICHARD *v.* TIMOTHY and ROBERTS. *May* 2.

A debtor, by deed, assigned all his estate and effects to trustees to pay rateably and in proportion his creditors who should execute the deed within twenty-one days from the date thereof, the several debts or sums set opposite their names in the schedule: provided that such creditors as did not assent in writing within such further time as the trustees should declare should be excluded from all benefit under the deed.—*Held*, that as the deed, on the face of it, professed to be a deed of arrangement between the debtor and the whole body of his creditors, it was not admissible in evidence without registration under the 194th section of the Bankruptcy Act, 1861, although it might not be a valid deed under the 92nd section.

THIS was an appeal from the decision of the judge of the County Court of Anglesey.

The action was brought to recover the sum of 40*l.* for half a year's use and occupation of the Railway Hotel at Llanfair, in the county of Anglesey.

At the trial, the plaintiff sought to prove that one Lloyd was tenant to the plaintiff of the hotel at 80*l.* a year, and that half a year's rent became due on the 13th May, 1864.

On the 16th of March, 1864, Lloyd executed an assignment to the defendants of all his personal estate and effects for the equal benefit of his creditors. The deed (so far as material) was as follows:—

"This indenture, made, &c., between W. Lloyd, of the first part, M. Roberts and E. Timothy, trustees for themselves and the rest of the creditors of the said W. Lloyd, parties hereto, of the second part, and the several other persons whose names and seals are hereunto subscribed and set, being respectively creditors of the said W. Lloyd, of the third part: Whereas the said W. Lloyd is justly indebted unto the parties hereto of the second and third parts in the several sums set opposite to their respective names in the schedule hereunder written, which he is unable to pay in full, and hath therefore proposed, and hath agreed to assign, all his estate and effects unto the said trustees for the benefit of his creditors as hereinafter mentioned: Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the

1866.
PRICHARD v. TIMOTHY.

premises, &c., the said W. Lloyd doth by these presents bargain, sell, assign, transfer and set over unto the said trustees, their executors, &c., all the stock in trade, goods &c., and all other the personal estate whatsoever and wherso soever of him the said W. Lloyd in possession, reversion remainder or expectancy: Habendum the said stock in trade and all other the estate, effects and premises hereby assigned unto the said trustees, their executors, &c., absolutely: Upon trust, nevertheless, to collect and receive, sell and dispose of, the hereby assigned premises, &c., and out of the monies to be received to pay, retain and satisfy rateably and proportionably, and without any preference or priority, to themselves, the said trustees and their partners: and the other persons, parties hereto, of the third part, who shall execute these presents within twenty-one days from the date hereof, the several debts or sums set opposite their respective names in the said schedule hereto: Provided, nevertheless, that such creditors of the said W. Lloyd as shall not execute or assent in writing to take the benefit of these presents on or before the 16th day of April next, or within such further time not exceeding thirty days as the said trustees shall, by writing under their respective hands and seals declare, shall be excluded from all benefit under these presents.

Immediately upon the execution of the assignment, the defendants entered into and retained possession of Lloyd's effects in the said hotel.

The solicitor who prepared the assignment from Lloyd to the defendants was called upon at the trial to produce it; and, upon its production it was found that it was not registered under the provisions of the 192nd or 194th sections of the Bankruptcy Act, 1861, whereupon the defendant's counsel objected to its being admitted in evidence.

The Judge held that, because the deed was not registered, was inadmissible in evidence for the purpose for which it as sought to be put in evidence; and he gave a verdict r the defendants.

Should the Court be of opinion that the Judge was ght, the verdict is to stand. But should the Court be f opinion that he was wrong, the verdict is to be entered r the plaintiff.

J. Brown, for the appellant.—The deed was admissible in evidence without being registered under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134). It is not required to be registered by the 192nd section of that Act, because it is not a deed for the benefit of all the creditors, but only of such as elect to execute it within a limited period: *Ex parte Woodhouse* (*a*). [*Pigott*, B.—Is it not a deed between the debtor and trustees on behalf of *all* his creditors, inasmuch as all might execute it?] In *Dewhurst* v. *Kershaw* (*b*) a deed in similar terms was held invalid within the 192nd section. Neither is this a deed which is required to be registered by the 194th section. In *Hodgson* v. *Wightman* (*c*) this Court held that the 194th section applied to deeds which are obviously, on the face of them, intended to be deeds of arrangement or agreement between a debtor and the whole body of his creditors. [*Bramwell*, B.—The case states that the debtor executed an assignment of all his estate and effects for the equal benefit of his creditors.] It appears upon the face of this deed that it was only intended to be an arrangement with such of the creditors as should execute it. In *Hodgson* v. *Wightman* (*c*) the Court inferred from the language of the deed, an intention that it should be executed by or binding on the whole

(*a*) 1 De Gex, J. & S. 288. (*b*) 1 H. & C. 726.
(*c*) 1 H. & C. 810.

1866.
PRICHARD v. TIMOTHY.

body of creditors. [*Bramwell*, B.—An assignment for the benefit of creditors comprehends *all* the creditors.] This deed, if registered, would not have afforded a defence to an action against the debtor by a non-assenting creditor: *Berridge* v. *Abbott* (*a*).

Macnamara appeared for the defendants, but was not called upon to argue.—He referred to *How* v. *Kennett* (*b*) and the judgment of Lord *Westbury* in *Ex parte Wensley* (*c*).

MARTIN, B.—We are all of opinion that the Judge was right in refusing to admit this deed in evidence, on the ground that it was not registered as required by the Bankruptcy Act, 1861. It seems to me that *Hodgson* v. *Wightman* (*d*) is directly in point, and that if the Judge had admitted the deed he would have disregarded the authority of that case. *Hodgson* v. *Wightman* decided that the 194th section of the Bankruptcy Act, 1861, applies not only to deeds which comply with and are framed under the 192nd section, but to every deed whatever which is or professes to be, or is obviously on the face of it intended to be, a deed of arrangement between a debtor and the whole body of his creditors.

We must therefore ascertain what this deed professes to be, or is obviously on the face of it intended to be. It is made between the debtor, of the first part, the defendants trustees for themselves and the rest of the creditors, of the second part, and the several other persons whose names and seals are thereunto subscribed and set, being respectively creditors of the debtor, of the third part. It assigns all the debtor's estate and effects to the trustees, to pay rateably themselves and the parties of the third part who

(*a*) 13 C. B. N. S. 507.
(*b*) 3 A. & E. 659.
(*c*) 1 De Gex, J. & S. 273. 278.
(*d*) 1 H. & C. 810.

should execute the deed within twenty-one days from the date thereof the several debts set opposite their names in the schedule. It may be that this deed would not bar an action by a non-assenting creditor; but according to *Hodgson* v. *Wightman* that is not the test as to whether it is admissible in evidence without registration under the 194th section; but the test is, whether it professes to be, or is obviously on the face of it intended to be, a deed of arrangement between the debtor and the whole body of his creditors. It seems to me that this is such a deed, and that, unless *Hodgson* v. *Wightman* is overruled, the defendants are entitled to judgment. If we could clearly perceive the object of the enactment, we ought to construe it according to the intention of the legislature, but when we cannot see what their intention was we ought to give the enactment a fair construction according to the plain and obvious meaning of the words. As I have had occasion to observe before, I have never read a satisfactory judgment upon these sections of the Bankruptcy Act, 1861.

BRAMWELL, B.—The case states that on a certain day the debtor executed an assignment to the defendants of all his estate and effects *for the equal benefit of his creditors.* That means *all* his creditors. Mr. *Brown* says that we must look at the deed itself; but on looking at the deed I think it means the same thing. It is a deed for the benefit of all the creditors, because *all* may execute it; and if any creditor thinks fit not to execute it he gives up all benefit under it.

PIGOTT, B.—I am of the same opinion. If the legislature had intended that the provisions of the 194th section should apply only to deeds under the 192nd section they would have said so. The 194th section has a far more

1866.

PRICHARD v. TIMOTHY.

extensive operation, and includes deeds in the same form as that in this case. If the argument for the plaintiff were correct, a Judge at nisi prius, whenever one of these deeds was tendered in evidence, would have to examine all the cases in point and ascertain whether the deed was valid under the 192nd section before he could determine whether it was admissible in evidence without registration under the 194th section. In my opinion it was this very difficulty which the legislature intended to avoid.

Judgment for the respondents.

May 3.

TANNER *v.* THE EUROPEAN BANK.
BOWEN *v.* SAME.

B. assigned to T., by way of mortgage, certain policies of assurance. T. delivered the policies to the defendants, to collect the money due thereon. The defendants failed to do so, and T. sued them for the policies, declaring on the special contract, with counts in trover and detinue. Afterwards B. sued the defendants for the policies, and upon an interpleader summons *Bramwell*, B., ordered that the action by T. be stayed until further order; that T. be at liberty to defend the action by B. giving the defendants an indemnity, and that B. give them security for costs.—*Held*: that the order was just and reasonable, and that the Judge had power to make it under the 12th section of the Common Law Procedure Act, 1860.

H. T. COLE, on behalf of Tanner, the plaintiff in the first of the above mentioned actions, obtained a rule nisi to rescind an interpleader order made by *Bramwell*, B.

It appeared by the affidavits that Bowen, the plaintiff in the second of the above mentioned actions, by indenture assigned to Tanner the policies of assurance on two ships named the "Alliance" and "Duchess of Sutherland," subject to a proviso for redemption on payment of a sum advanced. Tanner delivered the policies to the defendants for the purpose of collecting money under them at Havre, but in consequence of some legal difficulty raised there as to evidence of title the defendants were unable to obtain payment of the amount. Whilst the defendants had the

policies in their custody, Bowen gave them notice that he claimed them, and required the defendants not to part with them to any other person than himself. On the 21st September Tanner commenced his action against the defendants, in which the first count of the declaration stated that the plaintiff had delivered the policies of assurance to the defendants that they might collect the losses thereon, and that the defendants had not collected such losses within a reasonable time, and refused to redeliver the policies. There were also counts in trover and detinue. On the 25th September Bowen commenced his action against the defendants to recover the same policies. Thereupon the defendants took out an interpleader summons under the 1 & 2 Wm. 4, c. 58, s. 1, which was heard before *Bramwell*, B., who made the following order:—

"Upon hearing, &c., I do order that all further proceedings in the first mentioned action be stayed until further order. And I further order that the plaintiff in the first mentioned action be at liberty to defend the action by Bowen against the defendants, the plaintiff in the first mentioned action giving to the defendants an indemnity. And that the plaintiff Bowen give security for costs to the defendants."

Whereupon the present rule was obtained; against which

T. Salter shewed cause.—It is objected that the first mentioned action is, in substance, for a breach of duty, and therefore the case is not within the Interpleader Act, 1 & 2 Wm. 4, c. 58, s. 1. But the learned Judge had power to make the order under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126). By the 12th section of that Act, "where an action has been commenced in respect of a common law claim for the recovery of money or goods,"

1866.

TANNER v. EUROPEAN BANK.

the Court or a Judge may give relief by interpleader order, "though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another." The language of that section is large enough to include this case. *Best* v. *Hayes* (*a*) is an authority in point.

H. T. Cole, in support of the rule.—The defendants seek to be relieved from a breach of duty in not returning the policies to Tanner on request. [*Bramwell*, B.—That is not so. The defendants say, "If Tanner has sustained any damage we are willing to pay him, but we do not want to hand over these documents to him and then be liable to Bowen.] The rights of Tanner against the defendants cannot be determined in an action by Bowen against them. Bowen may have a good title as against the defendants, but not against Tanner. [*Bramwell*, B.—There has been no dealing between the defendants and Bowen, so that he cannot succeed unless he shews the absolute ownership in the policies, and then Tanner can have no title.] In this case a bill of interpleader could not be maintained in a Court of equity: *Crawshay* v. *Thornton* (*b*). [*Martin*, B.—In *Best* v. *Hayes* (*a*) we declined to be bound by the principles which govern Courts of equity upon a bill of interpleader.] The order that Bowen shall give the defendants security for costs affords the plaintiff Tanner an insufficient indemnity; for in defending the action he will be liable to extra costs not allowed on taxation. Moreover, he seeks to recover damages upon the special count, and is therefore prejudiced by the stay of proceedings.

MARTIN, B.—I am of opinion that the rule ought to be

(*a*) 1 H. & C. 718. (*b*) 2 Myl. & C. 1.

discharged. We have power under the Interpleader Act, 1 & 2 Wm. 4, c. 58, s. 1, to direct an issue, or by consent to determine "the merits of the claims in a summary manner, and to make such rules and orders as to costs and all other matters as may appear to be just and reasonable." It is true that when that enactment first came into operation, the Judges, especially those of this Court, acted under the idea that they were bound by the decisions of Courts of equity upon a bill of interpleader; but in the case of *Best* v. *Hayes* (*a*) this Court pointed out that the authority given by the Interpleader Act to Courts of common law was to make such order as appeared just and reasonable, without being fettered with the rules of Courts of equity. I am by no means certain that if I had been in the position of my brother *Bramwell* I should have made the same order; but nevertheless I think it a just and reasonable order, and that we ought not to interfere.

BRAMWELL, B.—I acted upon the provisions of the Common Law Procedure Act, 1860, and the authority of *Best* v. *Hayes*. I confess, however, that I had some misgivings as to the correctness of the order, because there is much cogency in the argument that the defendants, having obtained possession of these policies under a contract with the plaintiff Tanner, ought not to set up against him the jus tertii. But, having the authority of *Best* v. *Hayes*, I thought that I ought to place the plaintiff, Tanner, in the same position as if Bowen had brought an action against him.

I am satisfied that no injustice is done by the order and for this reason. The situation of a bailee is somewhat similar to that of a tenant, for although he cannot deny the title of the person from whom he obtained possession of the

(*a*) 1 H. & C. 718.

1866.
TANNER v. EUROPEAN BANK.

chattel, yet, if the real owner recovered it from him, he would have a good defence to an action by the bailor, in the same way as a tenant who has been evicted by a person having the legal estate may shew that his landlord's title is determined. That is the principle on which I made the order; for if Bowen had gone on with his action and had recovered against the defendants, which he could only have done by shewing an absolute title to the policies, the defendants would have had a good defence to the action by Tanner against them.

Therefore I think that the order was in substance rightly made. It may require some revision as to its details, and if the plaintiff, Tanner, is desirous of going on with his action in order to recover special damage, he may apply at Chambers for leave to proceed upon the special count, the other counts being struck out of the declaration. I will only add, that if no title had been shewn in Bowen I should not have made the order; but my impression is that a sufficient primâ facie title was made out.

PIGOTT, B.—I am also of opinion that the order was rightly made, and I am satisfied that no injustice is done by it. Indeed, it seems to me that my brother *Bramwell* has taken great pains to secure justice by requiring Bowen to give the defendants security for costs. If Bowen declines to proceed with his action, upon an application at Chambers he may be barred.

This rule was applied for on the ground that a special contract is not within the Interpleader Acts. However that may have been with respect to the 1 & 2 Wm. 4, c. 58, it seems to me that this case is clearly within the 23 & 24 Vict. c. 126. That Act has extended the limited power conferred by the former Act, and enables Courts of law to do justice between the parties, though the titles of

the claimants have not a common origin, but are adverse to and independent of one another. An innocent bailee is placed in a position of great hardship; he is subject to an action upon his contract with the bailor, and he is subject to another action at the suit of the other claimant. From that hardship it is but just and equitable that he should be relieved, and I am glad that the Courts have not so construed the latter Act as to limit the power conferred upon them.

Rule discharged.

BRIGGS v. OLIVER.

May 1.

The plaintiff, while making an inquiry at the door of a house in which the defendant had offices, received a push from the defendant's servant, who was watching a packing case propped against the wall of the house, and belonging to the defendant, and the packing case then fell upon and injured the plaintiff. There was no proof why the packing case fell, or who placed it against the wall.—*Held*, that the fall of the packing case was primâ facie evidence of its being set up improperly, and that there was evidence for the jury of the defendant's negligence: Per *Bramwell*, B., and *Pigott*, B. Dissentiente *Martin*, B.

THE first count of the declaration stated that the defendant wrongfully placed and maintained, in and upon a certain public street and footway in the city of Manchester, certain goods of the defendant, whereby the plaintiff, being lawfully in and upon the said street and footway, was struck and injured by the said goods, and his leg, ancle and foot bruised, &c.

The second count stated that the defendant so negligently conducted himself in and about the placing, keeping, upholding and managing of certain goods of the defendant that the same were cast and fell upon the plaintiff, then being lawfully in and upon the public street, in the first count mentioned, whereby the plaintiff sustained the injuries, &c.

The action was tried at the Manchester Court of Record,

1866.
BRIGGS v. OLIVER.

before the Recorder, when the material evidence was as follows:—

The plaintiff, being called as a witness, said:—"Between five and six o'clock in the evening of the 20th October I was going to the office of Gregory, in Brown Street. It was getting dusk. Oliver (the defendant) carried on business in the same building. A man was standing at the door, and I asked him if Gregory's office was in that building. He gave me a push which sent my body into the street, and left my leg on the footpath. I had not seen a large packing case reared against the wall, but it fell on my foot. A large case nearly five feet high, and three or four feet wide, of considerable weight." The witness, after stating that the defendant, on being applied to by letter, had called upon him, proceeded:—"I told him something my wife had said—that the man who was watching the packing case had represented himself as Mr. Oliver. He said: 'Nonsense, I am Mr. Oliver.' He said it was his packing case, and the man was his servant, and would be his witness." On cross-examination the witness said that the man did all he could to prevent the packing case falling on him.

Ann Briggs, the plaintiff's wife, said:—"I saw the man who said he was Mr. Oliver on the night of the accident. He said he was the man who was minding the case."

The learned Recorder, being of opinion that there was no evidence of negligence, directed a nonsuit to be entered, it being arranged that if the Court should be of opinion that there was any evidence for the jury a verdict should be entered for 30*l.*

Prentice, on a former day in this Term, obtained a rule nisi to enter a verdict for 30*l.*, on the ground that the nonsuit was improper, as there was evidence for the jury of the defendant's negligence.

C. Pollock shewed cause.—The primary cause of the accident was the push given to the plaintiff, and, but for that push, there is no evidence that the packing case would have struck him. The push was an unauthorized act, whatever were the motives of the person who gave it. [*Bramwell*, B.—The plaintiff was not the less lawfully where he was when the packing case struck him.] Then there is a total absence of evidence as to how the packing case came to be where it was, or what caused it to tumble. It is said, indeed, that on the evidence it is unreasonable to suppose that the packing case was placed where it was by any one but the defendant or his servants. But, the onus probandi being on the plaintiff, surmise and presumption ought not to be substituted for strict proof, especially in a case where there is no difficulty in obtaining it. *Byrne* v. *Boadle* (*a*), which was relied on in moving for the rule, is distinguishable. There, while some barrels of flour were being lowered from an upper room in the defendant's house to a cart in the street, one of them fell on the plaintiff, and *Pollock*, C. B., said that the presumption was that the persons engaged in removing the defendant's flour were the defendant's servants. But here there is nothing to connect the packing case with the premises of the defendant, or to shew who placed it where it was at the time of the accident. The true rule is that laid down by *Williams*, J., in *Cotton* v. *Wood* (*b*), that where the evidence is as consistent with the non-existence as with the existence of negligence the case ought not to be submitted to the jury.

Prentice, in support of the rule.—The cases of *Byrne* v. *Boadle* (*a*) and *Scott* v. *The London Dock Company* (*c*)

(*a*) 2 H. & C. 722. (*b*) 8 C. B. N. S. 568.
(*c*) 3 H. & C. 596.

1866.
BRIGGS v. OLIVER.

are decisive authorities, necessarily governing the presen case. *Byrne* v. *Boadle* (*a*), indeed, goes beyond it, fo there it did not appear that any servant of the defendan was in charge of the flour barrels. If the packing case wa not on the defendant's premises, but on the highway, th is rather against the defendant than in his favour, sin it shews a greater degree of negligence. The true pri ciple is distinctly laid down by *Erle*, C. J., in *Scott The London Dock Company* (*b*), that "where the thing shewn to be under the management of the defendant his servants, and the accident is such as in the ordina course of things does not happen if those who have t management use proper care, it affords reasonable evidenc in the absence of explanation by the defendants, that th accident arose from want of care."

PIGOTT, B.—The Court being divided in opinion, it devolves on me to give my judgment first. I am of opinion that there is evidence for the jury of the defendant's negligence. A packing case belonging to the defendant was reared against the wall of his premises, and there was evidence that the defendant's servant was watching it This packing case fell on the plaintiff, and, as I infer, fel by its own weight, and from having been propped up insecurely, since there was no evidence that it was disturbe in any way so as to cause its fall. These facts are, I think evidence of the defendant's negligence. I quite agre with the rule adverted to by *Williams*, J., in *Cotton* v *Wood* (*c*), that, where the evidence is equally consisten with the existence or non-existence of negligence, it is no competent to the Judge to leave the question to the jury. But, inasmuch as packing cases do not usually fall of them-

(*a*) 2 H. & C. 722. (*b*) 3 H. & C. 596. 601.
(*c*) 8 C. B. N. S. 568.

selves, unless there has been some negligence in setting them up, the facts of this case appear to me to be consistent only with the existence of negligence either in the defendant or in some person for whose act he is responsible. Moreover, I think we could not decide this case in the defendant's favour without overruling *Byrne* v. *Boadle* (*a*) and *Scott* v. *The London Dock Company* (*b*).

BRAMWELL, B.—I am of the same opinion; and I agree with my brother *Pigott* that we should be overruling *Byrne* v. *Boadle* (*a*) and *Scott* v. *The London Dock Company* (*b*) by holding that in this case there was no evidence of negligence. There is abundant evidence that the plaintiff was responsible for this packing case. It was his, it was close to his premises, and there was evidence that his servant was watching it. If, therefore, it was in an unsafe position, and did damage, he is responsible. Was there then evidence of this? I think there was, and that this is one of those cases in which, as has been said, "res ipsa loquitur." Packing cases carefully placed in a proper position do not naturally tumble down of their own accord; and we have no right to assume that the fall of this packing case was caused by the act of some one who was not the defendant's servant. But as, in *Byrne* v. *Boadle* (*a*), it was said that casks of flour do not roll out of window naturally, and that if one of them falls in the course of being handed out that is primâ facie negligence in those who are handing it out; and as, in *Scott* v. *The London Dock Company* (*b*), it was said that if a bag of sugar, on being let down in a sling, falls, that is primâ facie evidence of its having been improperly placed in the sling; so here the facts shew a primâ facie case. The substance of the matter is that a packing case, for which the plaintiff was responsible, fell on the defend-

(*a*) 2 H. & C. 722. (*b*) 3 H. & C. 596.

1866.

SIR CHARLES TAYLOR, BART., *v.* THE CHICHESTER AND MIDHURST RAILWAY COMPANY.

April 23.

DECLARATION.—For that, by certain articles of agreement made and entered into the 17th day of February, A. D. 1865, between the defendants of the one part, and the plaintiff of the other part, after reciting that the plaintiff was the owner of or otherwise entitled to an estate situate in the county of Sussex, and that the defendants had given notice of their intention to apply in the then present session of parliament for an Act to enable them to make a railway in the said articles of agreement described and mentioned, and had deposited a bill in parliament for that purpose: and reciting that, inasmuch as the line of the said proposed railway would pass through the said estate of the plaintiff in such a manner as to intersect and seriously damage the same, the plaintiff had intimated to the defendants his intention to oppose the passing of the said bill into an Act: and reciting that the plaintiff had agreed to withhold his said intended opposition upon the terms and conditions thereinafter contained, it was, among other things, that it should pass through the plaintiff's estate at certain defined points. 2. That the Company would purchase from the plaintiff, and he would sell to them, at the price of 2000*l.*, certain portions of his estate required for the railway. 3. That the Company would, in addition to the said sum of 2000*l.*, and within three calendar months after the passing of the bill, pay the plaintiff the further sum of 2000*l.* as and for a personal compensation for the annoyance, inconvenience and disturbance, damage, loss and injury which he had sustained, and might or would sustain, in respect of the sporting and preservation of game upon his estate, by or in consequence of the construction of the railway, and of the parliamentary and other surveys and other works connected therewith and incidental thereto. The bill having passed, to an action by the plaintiff for not paying the compensation, the defendants pleaded: first, that the railway was never constructed, and that they had not required or taken the plaintiff's land. Secondly: that the plaintiff did not sustain any annoyance, inconvenience, disturbance, damage, &c., in respect of the sporting and preservation of game upon his estate in consequence of the construction of the railway or of the parliamentary or other surveys, &c. On demurrer to the pleas:

By articles of agreement between a railway Company and the plaintiff, after reciting that the Company intended to apply to parliament for an Act to make a railway which would pass through the plaintiff's estate, and that he had agreed to withhold his opposition upon the terms and conditions thereinafter contained, it was agreed:—1. That if the bill passed, the Company would construct the railway so

Held.—First: that the pleas were bad, inasmuch as the defendants had absolutely contracted, upon a given event, to pay the 2000*l.*

Secondly, that it did not appear upon the face of the pleadings that the contract was ultra vires.

Thirdly, that if no damage had been in fact sustained and the agreement was merely colourable, that fact should have been alleged, and would have afforded a good defence: Per *Bramwell*, B., and *Pigott*, B.

1866.
BRIGGS
v.
OLIVER.

ant and injured him, and that raises a question for the jury as to the defendant's negligence.

MARTIN, B.—I am of opinion that the Recorder was right, and that there was no evidence for the jury of the defendant's negligence. No proof is adduced as to how the packing case came to be where it was, or how it came to be knocked down. Cases like the present especially depend on their own facts, and though I have no wish to overrule any previous decision I cannot think that a case where a barrel of flour fell from a doorway at the top of a building can govern the present. The declaration alleges negligence, but instead of evidence to support it there is nothing but surmise and imagination. The fallacy which appears to me to underlie these cases is that the plaintiff is to be excused from proving negligence because the person who really knows whether there is negligence or not is the defendant's servant. Here the plaintiff might have called him; it is not to be assumed that he would have committed perjury, nor is it for the defendant to disprove negligence.

As to the law, my view accords with that stated by *Williams*, J., in *Cotton* v. *Wood* (*a*), viz., that it is a rule of the law of evidence of the first importance that, where the evidence is equally consistent with either the existence or the non-existence of negligence, it is not competent to the Judge to leave the matter to the jury. And in the same case *Erle*, C. J., said that a plaintiff is not entitled to succeed unless there be affirmative proof of negligence. In that view I entirely concur, and therefore, inasmuch as although there may have been negligence in this case, it is consistent with the evidence that there was none, I think the plaintiff was rightly nonsuited.

Rule absolute.

(*a*) 8 C. B. N. S. 568.

1866.

SIR CHARLES TAYLOR, BART., *v.* THE CHICHESTER AND MIDHURST RAILWAY COMPANY.

April 23.

DECLARATION.—For that, by certain articles of agreement made and entered into the 17th day of February, A. D. 1865, between the defendants of the one part, and the plaintiff of the other part, after reciting that the plaintiff was the owner of or otherwise entitled to an estate situate in the county of Sussex, and that the defendants had given notice of their intention to apply in the then present session of parliament for an Act to enable them to make a railway in the said articles of agreement described and mentioned, and had deposited a bill in parliament for that purpose: and reciting that, inasmuch as the line of the said proposed railway would pass through the said estate of the plaintiff in such a manner as to intersect and seriously damage the same, the plaintiff had intimated to the defendants his intention to oppose the passing of the said bill into an Act: and reciting that the plaintiff had agreed to withhold his said intended opposition upon the terms and conditions thereinafter contained, it was, among other things, that it should pass through the plaintiff's estate at certain defined points. 2. That the Company would purchase from the plaintiff, and he would sell to them, at the price of 2000*l.*, certain portions of his estate required for the railway. 3. That the Company would, in addition to the said sum of 2000*l.*, and within three calendar months after the passing of the bill, pay the plaintiff the further sum of 2000*l.* as and for a personal compensation for the annoyance, inconvenience and disturbance, damage, loss and injury which he had sustained, and might or would sustain, in respect of the sporting and preservation of game upon his estate, by or in consequence of the construction of the railway, and of the parliamentary and other surveys and other works connected therewith and incidental thereto. The bill having passed, to an action by the plaintiff for not paying the compensation, the defendants pleaded: first, that the railway was never constructed, and that they had not required or taken the plaintiff's land. Secondly: that the plaintiff did not sustain annoyance, inconvenience, disturbance, damage, &c., in respect of the sporting and preservation of game upon his estate in consequence of the construction of the railway or of the parliamentary or other surveys, &c. On demurrer to the pleas:

By articles of agreement between a railway Company and the plaintiff, after reciting that the Company intended to apply to parliament for an Act to make a railway which would pass through the plaintiff's estate, and that he had agreed to withhold his opposition upon the terms and conditions thereinafter contained, it was agreed:—1. That if the bill passed, the Company would construct the railway so

Held.—First: that the pleas were bad, inasmuch as the defendants had absolutely contracted, upon a given event, to pay the 2000*l.*

Secondly, that it did not appear upon the face of the pleadings that the contract was ultra vires.

Thirdly, that if no damage had been in fact sustained and the agreement was merely colourable, that fact should have been alleged, and would have afforded a good defence: Per *Bramwell*, B., and *Pigott*, B.

1866.

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

agreed between the plaintiff and the defendants, th the event of the said bill, in its then or any amer modified or altered form, with the like objects, being p into an Act during the then present session of parliar the defendants would, within the space of three cale months next after the passing of the said bill, pay t plaintiff the sum of 2000*l.* as and for a personal comp tion to the plaintiff for the annoyance, inconvenienc disturbance, damage, loss and injury which the plaintif sustained, and might or would sustain, in respect o sporting and preservation of game upon his said esta or in consequence of the construction of the sai tended railway, and of the parliamentary and other su and other works connected therewith and incid thereto.—Averments: that the said bill was passed an Act in the then session of parliament, and that than three months elapsed between the passing of the bill into an Act and the commencement of this suit all conditions were performed, &c., necessary to entitl plaintiff to a performance of the said agreement by defendants and to maintain this action.—Breach: payment.

Pleas.—First: That the said articles of agreement and are to the tenor following, that is to say:—The then set out the articles of agreement in hæc verba, w after recitals to the effect stated in the declaration, cont the following clauses:—

1. In the event of the said bill, in its present or amended, modified or altered form, with the like ob being passed into an Act during the present session of p ment, the Company will make and construct the said posed railway so that the same shall enter and pass thr the said estate of the said Sir Charles Taylor at the and in the line or within the limits of deviation, marked

shewn on the plan hereunto annexed, or in some modified line to be mutually agreed upon between the parties hereto; and will not, without the express consent in writing of the said Sir Charles Taylor, make that portion of the said proposed railway for which the said deviation line is intended as a substitute, in the line shewn upon the plans deposited with the clerk of the peace of the said county of Sussex for the purposes of the said bill.

2. In the like event the Company will purchase from the said Sir Charles Taylor, his heirs or assigns, and the said Sir Charles Taylor will sell to the Company and their successors, at the price of 2000*l.*, the several pieces or parcels of land, being portions of the said estate which will be required for the construction of the railway and station, containing in the whole twenty acres or thereabouts.

3. In the like event the Company will, in addition to the said sum of 2000*l.*, and within the space of three calendar months next after the passing of the said bill, pay to the said Sir Charles Taylor the further sum of 2000*l.* as and for a personal compensation to him, the said Sir Charles Taylor, for the annoyance, inconvenience and disturbance, damage, loss and injury which the said Sir Charles Taylor has sustained, and may or will sustain, in respect of the sporting and preservation of game upon his said estate, by or in consequence of the construction of the said intended railway, and of the parliamentary and other surveys, and other works connected therewith and incidental thereto.

Averments.—That the said railway in the said articles of agreement mentioned hath not, nor hath any part thereof, nor hath any works been made or constructed; and that the defendants have not required or taken for the purposes of the said railway, or otherwise, any part of the plaintiff's said land or estate in the said articles of agree-

1866.

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

ment mentioned, or any lands, tenements or estate of the plaintiff whatever; nor have they ever given any notice of requiring or taking the said land or estate in the said articles of agreement mentioned, or any part thereof, or any lands, or tenements, or estate of the plaintiff; nor have they ever agreed with the plaintiff, or any person or persons, for the purchase or taking of any such lands, tenements, or estate, otherwise than by the said articles of agreement.

Second plea.—The defendants repeat the allegations in the said first plea made, and further say that the plaintiff did not sustain annoyance, inconvenience, disturbance, damage, loss or injury in respect of the sporting and preservation of game upon his said estate in consequence of the construction of the said railway, or of the parliamentary or other surveys, or other works connected therewith or incidental thereto; and that the said land or estate, or the plaintiff's interest in the same, never was injuriously affected by the execution of any works of the said railway Company.

Demurrer to each plea, and joinder therein.

Manisty (*Gadesden* with him), in support of the demurrer.—Two questions are raised by these demurrers: first, whether the liability on the part of the defendants to pay the 2000*l.* is conditional on their requiring or taking the plaintiff's land for the purposes of their railway: secondly, whether the agreement is ultra vires. The first question depends on the construction of the agreement. [*Bramwell*, B.—Should not the breach have been that the defendants would not purchase the plaintiff's land: *Laird* v. *Pim* (*a*)? *Martin*, B.—The defendants have contracted to pay the further sum of 2000*l.* upon an event which has

(*a*) 7 M. & W. 474.

happened, and whether or not they have taken the plaintiff's land is immaterial.] There is nothing illegal in such an agreement: *Sir John Simpson* v. *Lord Howden* (*a*).

The Court then called on

Bovill, to support the pleas.—First, the defendants are not liable to pay the plaintiff this 2000*l.* The agreement was made upon the assumption that if the bill passed the defendants would take the plaintiff's land; and by the third clause they contracted to pay the plaintiff, in addition to 2000*l.*, the price of the land, a further sum of 2000*l.* as a personal compensation for the damage he might sustain in respect of the sporting and preservation of game upon his estate in consequence of the construction of the railway. But the pleas clearly shew that the plaintiff has sustained no damage whatever, because the railway has never been constructed, and the defendants have never required or taken the plaintiff's land.

Secondly, the agreement is ultra vires. The defendants not having taken the plaintiff's land, there is no consideration for the payment of this 2000*l.*, except the withdrawal by the plaintiff of his opposition to the bill, and the case is within the principle of the decision in *Lord Shrewsbury* v. *The North Staffordshire Railway Company* (*b*). There *Kindersley*, V. C., after reviewing all the authorities, held that a contract by the promoters of a railway Company to pay an influential landowner 20,000*l.* in consideration of obtaining his countenance and support, was ultra vires and void. [*Martin*, B.—Ought not the defence to have been specially pleaded by way of confession and avoidance ?] As the objection appears upon the record, the defendants may avail themselves of it without plea. The money of the Company ought not to be

(*a*) 9 Cl. & F. 61. (*b*) 35 L. J. Chan. 156.

1866.

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

applied in payment of a claim which has no foundation, or in an alleged compensation for damage when none has been sustained. In the case of *Sir T. Gage* v. *The Newmarket Railway Company* (*a*) the defendants agreed to pay the plaintiff a certain sum, as purchase money, before they entered upon any part of his lands, and it was held that they were not bound to pay the money unless they entered upon *some* part of his lands. There the Court intimated an opinion that if the Company could be considered as having absolutely covenanted to pay the money to the plaintiff in a reasonable time after the passing of the Act, they should have thought the contract ultra vires and void. If a covenant to pay a landowner, within a reasonable time after the passing of the Act, a sum of money, independently of any entry upon his land, is ultra vires, a covenant to pay the money within a fixed period is equally so.—He also referred to *Macgregor* v. *The Deal and Dover Railway Company* (*b*).

MARTIN, B.—I am of opinion that both pleas are bad; and in my judgment sufficient does not appear upon the face of the declaration to shew that the contract is ultra vires. Moreover, I am disposed to think that, according to the 8th Pleading Rule of Trinity Term, 1853, the defence of ultra vires ought to be specially pleaded.

Now what are the facts? An incorporated railway Company, called the Chichester and Midhurst Railway Company, were about to apply to parliament for an Act to enable them to make a new line of railway which would pass through the estate of the plaintiff, whereupon this agreement was entered into. It is very common for railway Companies to apply to parliament and obtain authority to construct new lines, and it must be assumed from

(*a*) 18 Q. B. 457. (*b*) 18 Q. B. 618.

the fact of parliament so continually sanctioning contracts of this kind, that they are lawful. I am by no means satisfied that they are unlawful, and it seems to me rather fraudulent for a Company to enter into a contract of this kind, and then say that it is not binding because it is ultra vires.

However, I am of opinion that upon the face of this deed there is no ground for holding that the contract is illegal. It must be construed in the same way as other documents, with a view to ascertain what is the contract according to the natural and ordinary signification of the words. First, the defendants contract that in the event of the bill becoming an act of parliament they will construct the proposed railway so that it shall pass through the plaintiff's estate at certain defined points. Secondly, the defendants contract, in the like event, to purchase from the plaintiff, and the plaintiff contracts to sell to them, for the price of 2000*l.*, certain portions of his estate required for the construction of the railway. Thirdly, in the like event the defendants contract to pay the plaintiff, in addition to the sum of 2000*l.*, and within the space of three calendar months after the passing of the bill, a further sum of 2000*l.* as a personal compensation to him for the annoyance, inconvenience and disturbance, damage, loss and injury which he has sustained, and may or will sustain, in respect of the shooting and preservation of game upon his estate in consequence of the construction of the railway and of the parliamentary surveys and other works connected therewith and incidental thereto.

Now unless that contract is unlawful and void on the ground that it is ultra vires, the defendants have absolutely bound themselves to pay the plaintiff this 2000*l.* Then what is their answer? They say, first, that the railway has not, nor has any part thereof, nor have any works been

1866.
TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

made or constructed, and that the defendants have not required or taken for the purposes of the railway, or otherwise, any part of the plaintiff's land, &c. That is clearly a bad plea, because the defendants have absolutely contracted to pay the money within a certain specified time and it is perfectly immaterial that they have not constructed the railway or taken the plaintiff's land.

Then, for a further plea (repeating the allegations in the first plea), they say that the plaintiff did not sustain annoyance, inconvenience, disturbance, damage, loss or injury in respect of the sporting and preservation of game upon his estate, in consequence of the construction of the railway and that the land or estate, or plaintiff's interest in the same, was never injuriously affected by the execution of any works of the railway. That also may be quite true but the defendants have contracted to pay the 2000*l.* not only on account of damage already sustained, but in contemplation of anticipated damage arising from the construction of the railway.

For these reasons, I think that neither plea affords an answer to the plaintiff's claim, and consequently he is entitled to judgment.

BRAMWELL, B.—I am also of opinion that the plaintiff is entitled to judgment. Whether the doctrine of ultra vires was originally right, or not well founded, we cannot inquire here. It is established, and we must act upon it. Therefore, if it appears that this contract is ultra vires, we ought to decide against the plaintiff.

I agree with Mr. *Bovill* that a defendant is not bound to plead that a contract is ultra vires, if that appears upon the face of the declaration. Whenever illegality appears either by a declaration or any other pleading, a defendant

may avail himself of it although he has not pleaded it. But that rule is subject to this qualification, which is in truth part of the rule, that when it is intended to say that the facts are not true, but colourable, it should be so alleged. Therefore, if in this case the defendants meant to say that the agreement was colourable, and that, while they were merely buying off the plaintiff, they were pretending to pay him a compensation for injury to his land, when in point of fact he had sustained no damage but set up a fictitious claim for damage in order to obtain money, the defendants ought to have pleaded those facts, and they would have afforded a good defence to the action. As that has not been done we must assume that this is a real transaction.

Then is it ultra vires? I cannot think it is. The defendants covenant that they will, within three months after the passing of the bill, pay the plaintiff the sum of 2000*l.* as and for a personal compensation to him for the annoyance, inconvenience and disturbance, damage, loss and injury which he has sustained, and may or will sustain, in respect of the sporting and preservation of game upon his estate "by or in consequence of the construction of the intended railway, *and of the parliamentary and other surveys, and other works connected therewith and incidental thereto.*" Now, the defendants are the promoters of a new railway which would pass through the plaintiff's estate; and they had the parliamentary and other surveys made of his land. They had no right to enter upon it without the plaintiff's permission. It is true the second plea says that the plaintiff did not sustain any damage, but it does not state that the claim for damage was a mere pretence. It must therefore be assumed that the defendants covenanted to pay a sum of money as compensation for *some* damage. It seems to me, therefore, that the question of ultra vires does not arise, for

1866.

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

want of an allegation that the agreement was colourable, and though ostensibly made with one object was in truth made with another.

PIGOTT, B.—I am of the same opinion. The consideration is truly stated in the third clause, and I cannot see how the deed can be ultra vires. I agree with my brother *Bramwell* that if this transaction were merely colourable that fact ought to have been brought before us.

POLLOCK, C. B.—I have not heard the whole of the argument, but so far as I have heard it I entirely concur in the judgment of the Court.

Judgment for the plaintiff.

May 1, 3.

HUBBARD v. LEES.

The 10th section of the 7 Wm. 4 & 1 Vict. c. 26, applies as well to powers of appointment created after that Act as to those previously created.

Therefore a power, created after that Act, to appoint by will attested by *three* witnesses, is well executed by a will attested by *two* witnesses in conformity with the 9th section of that Act.

In questions of pedigree, entries of births, deaths and marriages of members of the family in a New Testament, produced from the proper custody, are evidence without proof of the handwriting.

So, also, correspondence between members of the same family, in which they respectively address one another as relatives.

EJECTMENT to recover possession of one undivided fourth part of a messuage, farm, &c., called "Shelmore Farm," in the parish of Norbury, in the county of Stafford.

At the trial, before *Montague Smith*, J., at the last Staffordshire Spring Assizes, the following facts appeared:—In the year 1818, one Thomas Johnson, being seised in fee of "Shelmore Farm," died intestate, leaving two daughters, Elizabeth and Mary, his co-heiresses at law. In the

year 1838 Elizabeth married George Hewitt Lander. Previous to her marriage she executed a settlement by which she conveyed (with other real estate) her undivided moiety of Shelmore Farm to a trustee for such uses (amongst others) as she "should, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by her legally executed, or by her last will and testament in writing, or any codicil thereto, to be by her signed and published in the presence of and attested by three or more credible witnesses, shall, from time to time direct, limit or appoint, give or devise the same; and in default of such direction, limitation or appointment, gift or devise, and so far as no such direction, limitation or appointment, gift or devise shall extend, to the use of the said Elizabeth Johnson, her heirs and assigns, for ever." On the 20th March, 1852, Elizabeth Lander, in pursuance of the power, made her will, by which she gave all her real estate to her husband, George Hewitt Lander, and his heirs absolutely. This will was attested by two witnesses only, in the form prescribed by the Wills Act, 7 Wm. 4 & 1 Vict. c. 26, s. 9. The defendant's counsel objected that this was not a valid execution of the power, and the learned Judge reserved the point.

Elizabeth Lander died on the 1st April, 1852, and on the 11th July, 1856, her husband, George Hewitt Lander, died intestate as to the estate in question. There was no issue of the marriage.

The plaintiff claimed as heir at law of George Hewitt Lander, and traced his descent from Charles Lander, the common ancestor of the plaintiff and George Hewitt Lander. Charles Lander had (besides other children) a son, John Lander, and a daughter, Elizabeth Lander. John Lander had an only son, George Lander, who was the father of George Hewitt Lander. Elizabeth Lander mar-

1866.
HUBBARD v. LEES.

ried James Moore, and they had (besides other children) a son, John Moore, and a daughter, Fanny, who married one Wells. John Moore had a daughter, Elizabeth Moore, who married John Hubbard, and the plaintiff was their eldest son.

The defendant was the tenant of one Thomas Purden, who, upon the death of George Hewitt Lander, obtained possession of the estate in question under a claim as heir at law of George Hewitt Lander. Thomas Purden, who was allowed by a Judge to defend the action, traced his descent from a sister of Charles Lander.

In order to prove the births and deaths of the other children of Charles Lander, the plaintiff gave in evidence various certificates of births, baptisms, marriages and deaths, and also adduced some parol evidence (*a*).

The plaintiff also tendered in evidence a copy of the New Testament, containing entries of the births and deaths of the children of Elizabeth Moore, the mother of John Moore, the plaintiff's grandfather. This Testament was produced by Maria Moore, a daughter of James Moore, the son of Elizabeth Moore's husband by a former wife. Maria Moore stated that the Testament was formerly her grandfather's; that she had seen it in the custody of Fanny Wells (the daughter of Elizabeth Moore), who had kept it until a few years before her death, when she gave it to James Moore, the father of Maria Moore. The defendant's counsel objected to the reception of the Testament in evidence, on the ground that there was no proof of the handwriting of the entries. The learned Judge admitted the Testament in evidence, and reserved the point.

The plaintiff also tendered in evidence certain letters forming part of a correspondence between Fanny Wells, the daughter of Elizabeth Moore, and Ann Lander, the

(*a*) See *post*, p. 421, note.

wife of John Lander, the grandfather of George Hewitt Lander, in which they respectively addressed one another as aunt and niece, and in which Fanny Wells mentioned the death of several of her relations. These letters were formerly in the custody of Fanny Wells. The defendant's counsel objected to their reception in evidence, on the ground that there was no proof of the handwriting. The learned Judge reserved the point and admitted the letters. The plaintiff also gave in evidence a letter of Thomas Purden, in which he set out the pedigree, by which the plaintiff's title was traced to John Moore.

No question was left to the jury, but the learned Judge, with the consent of counsel, directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit, or a verdict for the defendant on the objections taken.

Powell, in the present Term, obtained a rule nisi accordingly, or for a new trial, on the ground of the improper reception in evidence of the New Testament and the letters, and also that there was no valid execution of the power of appointment (*a*); against which

Gray and *Dowdeswell* shewed cause (April 17).—First, the New Testament was properly admitted in evidence. Entries in a family Bible, stating the fact and date of the birth, marriage or death of a child or other relation, are admissible in evidence without proof that they have been made by a relative; for as a Bible is the ordinary register

(*a*) *Powell* also moved on the ground that there was no sufficient evidence of the identity of the parties named in some of the certificates of births, baptisms and deaths; but the Court said that was entirely a question for the jury, and refused to grant a rule on that ground.

1866.
HUBBARD v. LEES.

of the pedigree of families, and usually accessible to all its members, the presumption is that they have acknowledged and treated the entries as correct. The same rule prevails with respect to entries in the New Testament. It is only necessary to prove that the Bible or Testament has come from the proper custody, and to account for the possession of the person who produces it. Here it was proved that the Testament was at one time in the possession of the sister of the plaintiff's grandfather.—Secondly, the letters were also admissible in evidence, for they were part of a correspondence between members of the same family, addressing each other as relatives, and making statements with reference to the death of other members of the family.—Thirdly, there was a valid execution of the power of appointment. The 10th section of the 7 Wm. 4 & 1 Vict. c. 26 enacts "that no appointment made by will in exercise of any power, shall be valid unless the same be executed in manner hereinbefore required; and *every will* executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such a power should be executed with some additional or other form of execution or solemnity." That section applies as well to powers created after as before the passing of the Act. It was so laid down by Lord *Westbury*, C., in *Taylor* v. *Meads* (*a*), which affirmed the decision in *West* v. *Ray* (*b*), that a power of appointment to be exercised by a writing under the hand and seal of the donee cannot be exercised by a will executed with only the formalities required by the 7 Wm. 4 & 1 Vict. c. 26. Here there is an express power to appoint by will.

(*a*) 34 L. J. C. 203. (*b*) Kay, 385.

Powell and *H. Matthews*, in support of the rule.—First, the entries in the New Testament were not evidence without proof of the handwriting, or that they were made by some member of the family. [*Martin*, B.—Such entries are quasi records.] The rule that entries in a Bible are admissible without proof that they were made by a relative, does not apply to any other book, however religious its character may be; but proof must be given, either that the entry was made by some member of the family, or that it has been acknowledged or treated by a relative as a correct family memorial, or, at least, if ancient, that it was made at the time when it purports to have been written: Taylor on Evidence, vol. 1, p. 565, 4th ed. [*Martin*, B.—What difference can it make that the entries are in the New Testament, not in the Bible ?]—Secondly, the letters were not admissible without proof of the handwriting. It should have been proved aliunde, not by the letters themselves, that they were written by a relative, and then they would be admissible as the written declarations of a deceased member of the family. [*Martin*, B.—Are they not authenticated by the conduct of a member of the family in preserving them. It seems to me the same as if Fanny Wells had said, "I have an aunt named Ann Lander."] A person, by preserving a document, cannot be taken to admit the truth of every statement contained in it.—Thirdly, there has been no valid execution of the power of appointment. The 9th section of the 7 Wm. 4 & 1 Vict. c. 26, declares that no will shall be valid unless in writing, and attested by two witnesses in a certain prescribed form. Then the 10th section provides that every will executed in the manner required shall be a valid execution of a power of appointment by will, notwithstanding some other form "*shall have been* expressly required." That does not apply to powers created after the Act came into operation. The

1866.
HUBBARD v. LEES.

legislature has in effect said, "whereas formerly three witnesses were required to a devise of real estate, and many powers of appointment by will of real estate were required to be attested by three witnesses, henceforth two witnesses only shall be necessary, unless the donor of the power shall require a greater number." Here the donor of the power, knowing that two witnesses only are required for a will, has thought fit to make three witnesses essential to the due execution of the power by will. *West* v. *Ray* (*a*) decided that where the donor has made certain required solemnities essential to the due execution of the power, the case does not fall within the 10th section of the 7 Wm. 4 & 1 Vict. c. 26. [*Bramwell*, B.—A power to appoint by any *writing* is within the Act, because a writing comprehends a will; but a power to appoint by any writing under hand and seal is not within the Act, because a will does not require a seal.] The statute does not operate to prevent the donor of a power from requiring whatever solemnities he may think fit.

MARTIN, B.—I am of opinion that this rule ought to be discharged. It is unnecessary to advert to all the matters which have been discussed, because the letter of the defendant brings down the pedigree to John Moore, the grandfather of the plaintiff. It seems to me that, apart from the entries in the Testament, there is distinct evidence of the heirship of the plaintiff to George Hewitt Lander.

But a question has been raised whether the Testament was admissible in evidence. Now, although the case was not submitted to the jury, the evidence was before them, and the rule is that if parties adduce evidence they must stand or fall by it; if the evidence was not admissible a

(*a*) Kay, 385.

new trial will be granted; for it is impossible for the Court to say on what particular piece of evidence the jury may have found their verdict. But I am of opinion that this Testament was admissible in evidence. It was proved by a witness to have been in the possession of Fanny Wells, and to have been given by her to her half brother, as her grandfather's book. It came from the proper custody, and there is no ground whatever for saying that it was not admissible in evidence unless the handwriting was proved; for if the handwriting could be proved there would probably be no occasion to resort to such evidence. It is because the entries are so old that it is impossible to prove the handwriting the Testament becomes evidence. To require proof of the handwriting would be to say that no such document shall be admissible in evidence. Entries in a Bible are in the nature of a record; and if it comes from the proper custody the entries are presumed to have been adopted by relatives cognizant of the facts.

For the same reason, I am also of opinion that the letters were admissible in evidence, for they were documents which came from the custody of a member of the family, and by them the fact is recognised that Ann Lander was the aunt of Fanny Wells.

Then with respect to the question arising upon the execution of the power of appointment, I am clearly of opinion that the case falls within the 10th section of the 7 Wm. 4 & 1 Vict. c. 26. What the legislature meant to express by that section is this:—"We are aware that powers of appointment may often be exercised by will, and we are also aware that the power must be executed in strict conformity with the instrument which created it; but inconvenience and mischief will probably arise in consequence of the donee of a power supposing that the ceremonies required for the execution of a will are sufficient for the

1866.
HUBBARD v. LEES.

execution of a power by will; we therefore enact that henceforth, whenever a power may be executed by will, it shall be sufficient if executed in the manner required for a will by this Act, although some additional form or ceremony is required by the instrument which created the power." That is the plain meaning of the 10th section, and its effect is that mere matter of form, so far as practicable, is dispensed with. There is nothing whatever in our judgment which in the slightest degree conflicts with the decision in *West* v. *Ray*.

For these reasons I am of opinion that there is no ground for a new trial either upon that point or the others which have been discussed, and that the rule must be discharged.

BRAMWELL, B.—I am entirely of the same opinion. The only observation which I think it is necessary to make is as to the letters. It is argued that the effect of our decision will be that the bare preservation of any letter or document by any person will be equivalent to a declaration by that person of the truth of every statement contained in it. But we do not lay down any such general proposition. These letters have no circumstances of suspicion about them. They are addressed to a relative, and contain statements with respect to the family; and I think that the fact of such relative having received and preserved them is some evidence of relationship, that is, that Ann Lander was the aunt of Fanny Wells.

Rule discharged.

1866.

KRAMER *v.* WAYMARK.

May 1.

An action for personal injuries is within the 15 & 16 Vict. c. 76, s. 139.

Therefore, where the plaintiff in such an action died between verdict and judgment, *Held*, that judgment signed within the time prescribed by that section was regular.

The Court refused a new trial, although the damages would probably have been less if the proximity of the plaintiff's death had been foreseen.

M. CHAMBERS, on a former day in this Term, had obtained a rule calling on the plaintiffs (*sic*) to shew cause why, upon payment by the defendant of the costs of the trial, and costs since incurred in this action, all further proceedings should not be stayed, or why a new trial should not be had on the ground of the death of the plaintiff since the trial and before judgment signed.

This was an action on the case by an infant (seven years old), suing by his next friend, for severe injuries to the head, eye and face, from the kick of a horse of the defendant. The injuries were sustained on the 4th of July, 1865. The trial took place before *Erle*, C. J., on the 28th of March, 1866, at the Surrey Spring Assizes, when medical evidence was adduced shewing that, besides the external injuries, there was injury to the brain, and that, if the child lived, it would, in all probability, be incapacitated for work. The jury found a verdict for the plaintiff, damages 150*l.* On the 6th of April, 1866, the child died from the effect of the injuries. The next friend, having signed judgment, the defendant's attorney, on attending the appointment for taxation of costs, applied to the Master not to tax pending an application to the Court, and the taxation had accordingly stood over for this application.

Murphy now shewed cause.—First, the Court will not stay proceedings if error could not be alleged. Here it could not, since judgment has been signed within the time

1866.
KRAMER v. WAYMARK.

prescribed by the 17 Car. 2, c. 8, s. 1 (*a*), and the 15 & 16 Vict. c. 76, s. 139 (*b*). It will be argued, no doubt, that the operation of these enactments is confined to such causes of action as would survive to the representatives of the deceased. But, the language of the legislature being perfectly general, there is nothing to warrant so restricted an interpretation. Upon the construction of the 17 Car. 2, c. 8, s. 1, there are two authorities, but they are directly in conflict. In *Ireland* v. *Champneys* (*c*) it was held by the Court of Common Pleas that final judgment entered up in an action of libel after the death of the plaintiff was irregular, the Court holding that the case was not within the statute. But in the later case of *Palmer* v. *Cohen* (*d*), the plaintiff having died between verdict and judgment, it was expressly decided that the statute applied to an action of libel, and the Court refused to set aside a judgment entered up by the executor. [*Bramwell*, B.—After the decision in *Palmer* v. *Cohen* (*d*) I do not see how we can stay proceedings. The defendants, if so advised, must bring error.] Secondly, as to the new trial. [*Bramwell*, B.—If the event had been foreseen, there would have been smaller damages.] Damages having been fairly assessed on a balance of events, what has since occurred affords no ground for interference.

M. Chambers (*Beasley* with him), in support of the rule.

(*a*) The 17 Car. 2, c. 8, s. 1, enacts:—"For the avoiding of unnecessary suits and delays, &c: That in all actions, personal, real or mixt, the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict.

(*b*) The 15 & 16 Vict. c. 76, s. 139, enacts:—"The death of either party between the verdict and the judgment shall not hereafter be alleged as error, so as such judgment be entered within two terms after such verdict.

(*c*) 4 Taunt. 884.

(*d*) 2 B. & Ad. 966.

—First, apart from any question on the construction of the statutes referred to, it is ground for a stay of proceedings that the personal representatives are the proper parties to proceed to taxation, and not the next friend of the deceased. The authority of a next friend is analogous to that of an attorney, which is determined by death: 1 Bac. Abr. tit. (Authority E.), *Palmer* v. *Reiffenstein* (*a*) and *Shoman* v. *Allen* (*b*).—Secondly, the action has abated by the plaintiff's death, and the 17 Car. 2, c. 8, s. 1, and 15 & 16 Vict. c. 76, s. 139, apply only where the cause of action survives. *Ireland* v. *Champneys* (*c*) is an express decision on the former statute, and the 139th section of the latter statute merely re-enacts the same provision. The 137th section is in terms as general as the 139th, but in *Flinn* v. *Perkins* (*d*) it was held, by *Crompton*, J., in the Bail Court, that the operation of the 137th section is confined to causes of action which survive, the intention of the legislature not being to give a new right of action, but merely to prevent abatement by death in those cases where the representatives could have brought an action. Thirdly, the Court having power to grant a new trial (*Griffiths* v. *Williams* (*e*)), the case is one for exercising it, since the jury have assessed the damages in anticipation that the child would live.

MARTIN, B.—We are all of opinion that this rule should be discharged. The first question which it raises depends on the construction of the 17 Car. 2, c. 8, s. 1, and the 15 & 16 Vict. c. 76, s. 139. The 17 Car. 2, c. 8, s. 1, enacts "that in all actions, personal, real or mixt, the death of either party between the verdict and the judgment shall not hereafter be alleged as error, so as such judgment be entered within two terms after such verdict." The 15 & 16

(*a*) 1 Man. & G. 94.
(*b*) 1 Man. & G. 96 n.
(*c*) 4 Taunt. 884.
(*d*) 32 L. J. N. S. Q. B. 10.
(*e*) 1 C. & J. 47.

1866.
KRAMER v. WAYMARK.

Vict. c. 76, s. 139, re-enacts that provision in similar terms, the only difference being that it does not enumerate the different kinds of action, most real and mixed actions being then abolished. As an authority on the former statute the case of *Ireland* v. *Champneys* (*a*) was cited, a decision which I confess I do not understand. But in the later case of *Palmer* v. *Cohen* (*b*) the same point arose again, and there the Court of Queen's Bench expressly decided that the 17 Car. 2, c. 8, s. 1, applied to an action of libel. Considering that the correct view, I think that these proceedings should not be stayed.

On the second point, viz., whether we should grant a new trial, it certainly seems rather hard that, when nothing is recoverable if the plaintiff dies the day before the commission day, the verdict should stand for the full amount if he dies a day or two afterwards. But the answer perhaps is that the line must be drawn at some point, and that the law has drawn it at the commission day. Moreover, it is conceded that if the plaintiff had survived the first four days of term this application could not be made. On the whole I think that here the matter should rest, and that in this case, at all events, we should not grant a new trial.

BRAMWELL, B.—The doubt which I have felt in this case is on the second point, viz., whether, as there is some hardship, and we have power to interfere, we ought not to do so. But while, on the one hand, if the plaintiff had died before the commission day nothing would be recoverable, if he had died after the first four days of term this application could not have been made. On the whole, I think we ought not to interfere.

On the other point, if the defendant be right, his course is to bring error; for with the case of *Palmer* v. *Cohen* (*b*)

(*a*) 4 Taunt. 884. (*b*) 2 B. & Ad. 966.

before us it is impossible that we can stay proceedings. Moreover, the 139th section of the Common Law Procedure Act, 1852, is in one respect stronger against the defendant than the 17 Car. 2, c. 8, s. 1, for the absence of any restriction in the 139th section is rendered more significant by the fact that the preceding section is expressly restricted to cases where the action survives.

PIGOTT, B.—I am of the same opinion. The words of the 139th section of the Common Law Procedure Act, 1852, are perfectly general, and I think we ought not to restrict their operation. On the other point I agree that we ought not to grant a new trial.

Rule discharged.

EASTER VACATION, 29 VICT.

IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

1866.

May 14.

A debtor and his creditors entered into a deed of inspectorship, under the Bankruptcy Act, 1861. Before the deed was executed by the debtor he had ordered of the plaintiff certain goods, and after the plaintiff had informed the debtor that they were ready for delivery the inspectors, by an order to which they signed their names "*for*" the debtor, requested the plaintiff to send the goods. —*Held*, that the inspectors were not personally liable for payment of the goods.

REDPATH *v.* WIGG AND O'BEIRNE.

THIS was a bill of exceptions to the direction of *Martin*, B., on the trial of this cause at the London Sittings after last Hilary Term. The declaration was for goods sold and delivered by the plaintiff to the defendants, and for work done, &c. The defendants respectively pleaded, never indebted, upon which issue was joined.

The bill of exceptions stated the following facts, as proved at the trial, on the part of the plaintiff:—The plaintiff was an iron founder, and manufacturer and patentee of ships' pumps and fire hearths, trading under the firm of Redpath & Leigh. The defendants were the inspectors of the estate of one Charles John Mare, appointed under the provisions of an indenture dated the 3rd day of January, 1865 (*a*). On the 12th December, 1864, the plaintiff received the following letter:—

(*a*) A copy of the indenture was annexed to the case, the material parts of which are the following:—

"This indenture, made the 3rd day of January, 1865, between Charles John Mare, of, &c., hereinafter called the debtor, of the first part, George Wigg, of, &c., and William Green (in whose place the defendant O'Beirne was appointed), of, &c., who, and the survivor of them, and the inspectors or inspector for the time being, are hereinafter referred to as the said inspectors or inspector, of the second part, and the several

"Messrs. Redpath & Leigh "12th Dec. 1864.

"Gentlemen,

"Herewith we beg to enclose order No. 189 for

persons, companies and partnership firms, who are creditors of the said debtor, or who would be entitled to prove under an adjudication of bankruptcy against him, had such been made on the day of the date of these presents, hereinafter called the said creditors, of the third part: Whereas the said debtor has for some time past carried on the business of a ship builder under the style or firm of C. J. Mare & Co., and being indebted in divers sums, which he is at present unable to pay in full, has proposed to his creditors that he should be allowed to carry on his said business for the benefit of his creditors during the period of six calendar months from the 1st day of January instant, under the inspection and subject to the approbation, direction and control of the said inspectors or inspector, with power for the said inspectors or inspector to extend the period, &c. Now this indenture witnesseth that in pursuance of the said agreement, and in consideration of the covenants, &c., by and on the part of the said debtor to be observed and performed, the said creditors do, and each and every of them doth, by these presents give and grant unto the said debtor, free, full and absolute liberty and licence henceforth to conduct, manage and carry on the same business, and to collect, get in, release and dispose of all his real and personal estate, of or to which he is now seised, possessed or entitled, under the inspection and subject to the approbation, direction and control of the said inspectors or inspector during the period of six calendar months, &c. And this indenture further witnesseth, &c., that the said debtor doth hereby, for himself, his heirs, &c., covenant with the said inspectors, &c., that he, the said debtor, will, when required so to do by the said inspectors, &c., draw out and state just true and exact accounts in writing of his debts and credits, property, estate and effects; and will use and exert his best and utmost endeavours, under and subject to the directions, control and advice of the said inspectors or inspector, to conduct, manage and carry on his said business. And further that he the said debtor will keep proper books of account relating to his said business, &c., and therein make true and proper entries of all his receipts, payments and disbursements; and will not become engaged in or undertake any new trade, or enter into any doubtful or uncertain contract. — (Then followed a power of attorney from the debtor to the inspectors to sue for and collect the estate and effects of the debtor and give receipts.) — And it is hereby agreed and declared that it shall be lawful for the said inspector or inspectors to employ, or autho-

1866.
REDPATH v. WIGG.

iron pumps and two fire hearths which be good enough to forward as soon as possible, and oblige

"Yours, &c., for C. J. Mare & Co.,
"J. Lathleau."

Enclosed in this letter was the following order, written upon a skeleton printed form, the words in Italics being in print, the rest in writing.

"No. 189, "*Northfleet Dockyard,*
"Messrs. Redpath & Leigh. "9th Dec. 1864
"*Please send* for E. C.
"3 of Redpath's patent Iron Pumps, No. 4 size.
"2 Fire Hearths (one for Natives of India)
"*for C. J. Mare & Co.*
"*R. Michael.*

rize the said debtor to employ, any persons or person, whether clerks, workmen, servants or others, to aid and assist in the carrying on of the said business, and from time to time to pay to such persons out of the monies in hand such reasonable salaries, wages or remuneration for services rendered as the said inspectors or inspector shall think fit.——(Then followed a power for the inspectors to allow the debtor a reasonable remuneration for his services.)—And it is hereby agreed and declared that all the monies which shall come to the hands, or under the control, of the said inspectors or inspector in the course of the inspection, shall, after payment thereout of all costs of and incidental to the obtaining payment or receipt of such monies, be applied, by or under the direction of the said inspectors or inspector, in the first place in payment of the costs and expences of and incidental to the investigation of the affairs of the said debtor, with a view to this arrangement, and of and incidental to the proportionate execution, stamping and registration of these presents, and procuring the signatures or assents of the said creditors thereto; and in the second place in payment of the costs, charges and expences of and incidental to the carrying out the powers and provisions of these presents (including the payment of any such salaries, wages, allowance or remuneration as aforesaid), and in the third place, in or towards payment, rateably and without preference or priority, of all the debts due from the said debtor to the said creditors.——(The indenture also contained other provisions similar to those in *Strick* v. *De Mattos*, 3 H. & C. 22.)

"*No goods will be received without a priced invoice and the number of our order on ditto.*"

To which the plaintiff sent the following reply:—

"Messrs. C. J. Mare & Co.

"Lea Cut Iron Works, Limehouse,

"Gentlemen, "London 12th Dec., 1864.

"We are duly in receipt of your favour of to-day, ordering three pumps and two fire hearths: the same shall have best attention.

"We will reply to yours of 10th inst. to-morrow morning: it was received only this morning.

"Gentlemen,

"Yours respectfully,

"Redpath & Leigh,

"pr J. J. Hepworth."

Before the goods in the said order specified were ready for delivery the said Charles John Mare stopped payment, and the said deed of inspectorship was subsequently executed. On the 1st February, 1865, the plaintiff wrote and sent the following letter:—

"Messrs. C. J. Mare & Co.

"Lea Cut Iron Works, Limehouse, E.

"Gentlemen, "London, 1st Feb. 1865.

"Referring to your order No. 189 for three pumps and two fire hearths (E. C.), we beg to say that the same are quite ready, and we await your instructions as to delivery. "We remain, Gentlemen,

"Yours obediently,

"Redpath & Leigh."

On or about the 6th of February the following order was received by the plaintiff, signed by the defendants:—

1866.
REDPATH v. WIGG.

"No. 291. "Northfleet Dockyard,
"Messrs. Redpath and Leigh, "3rd Feb., 1865.
"Please send three of Redpath's patent iron pumps No. 4 size. Two fire hearths (one for Natives of India)—
"George Wigg.
"J. Lyster O'Beirne.
"for C. J. Mare & Co.
"No goods will be received without a priced invoice and the number of our order on ditto."

The goods specified in the said order were of the value of 65*l.* 15*s.*, and were the same goods mentioned in the former order of the 9th December, 1864, which was ordered in the letter of the 12th instant, and were, on the 13th day of February, 1865, delivered at the place of business of the said Charles John Mare; and an invoice of the said goods was sent in at the time made out to inspectorship trustees of the estate of Messrs. Charles John Mare & Co.

On the 28th February, 1865, the following letter was written and sent to the plaintiff.

"Messrs. Redpath & Leigh. "Great St. Helens,
"Gentlemen, "28th Feb., 1865.
"We beg to enclose you invoice of pumps, &c., and shall be obliged by your sending us copy of same, with the alteration as marked, namely, Messrs. C. J. Mare & Co. in lieu of the inspectorship trustees.
"Yours, &c.,
"for C. J. Mare & Co.,
"J. Lathleau."

An invoice, in accordance with the request contained in the said letter, was afterwards sent by one of the plaintiff's clerks, but it was not proved that such invoice was sent with the plaintiff's authority, and the plaintiff was examined and stated on oath that he had given no such authority,

nor had he any recollection of any altered invoice being sent.

At the close of the plaintiff's case, the defendant's counsel insisted that the letters of the 12th December, 1864, and 1st February, 1865, were not admissible in evidence for the plaintiff, inasmuch as they were not shewn to have been written by the authority of the defendants; and also that, upon the evidence, the defendants were entitled to the verdict. The learned Judge declared that in his opinion the letters were admissible, and that there was evidence to go to the jury of the liability of the defendants in this action; and he directed the jury accordingly, and they found a verdict for the plaintiff. The defendants' counsel having tendered a bill of exceptions to the above direction, the case was argued (*a*) by

Matthew, for the defendants (*b*).—The learned Judge considered that the order of the 3rd February, 1865, was conclusive evidence against the defendants. But if the terms of the deed of inspectorship be referred to, it will be apparent that the order created no personal liability on the part of the defendants. There is no assignment to them of the debtor's property, but he is allowed to carry on his business under the inspectorship, and subject to the direction and control of the defendants. The debtor covenants that he will render to the inspectors true accounts, and they covenant that they will apply the monies which come to their hands in the manner provided by the deed. The defendants have no power to enter into contracts; but are

(*a*) May 14. Before *Willes*, J., *Byles*, J., *Blackburn*, J., *Keating*, J., *Shee*, J., *Montague Smith*, J., and *Lush*, J.

(*b*) *Garth* appeared for the defendant Wigg, and *Matthew* for the defendant O'Beirne, but as the Court declined to hear more than one counsel it was arranged that *Matthew* should argue for both defendants.

1866.
REDPATH v. WIGG.

authorized to pay those who become creditors since the execution of the deed before they distribute the assets among the previous creditors. Every presumption is against any intention on the part of the defendants to make themselves liable for any contract entered into by the debtor. The order of the 3rd February shews on the face of it that they were not contracting as principals, since they sign "for C. J. Mare & Co." If there was no such firm they might be liable, but they expressly intimate to the plaintiff that he must look to Mare & Co. for payment. [*Willes*, J.—According to the case of *Hart* v. *Alexander* (*a*) the onus of proof that the defendants had no authority from Mare & Co. to sign their name would rest with the plaintiff.] There is no ground for considering the inspectors as principals and Mare & Co. as their agents; and it is clear that the inspectors are not partners with Mare & Co.: *Cox* v. *Hickman* (*b*), *Bullen* v. *Sharp* (*c*).—The letters of the 12th December and 1st February were not admissible in evidence against the defendants. The former was written by a clerk of Mare & Co. before the deed of inspectorship was executed; and the latter was addressed to Mare & Co., and there is no evidence that the defendants had any knowledge of it. [*Blackburn*, J.—The letters were admissible as part of the res gestæ.]

J. Brown (*Barnard* with him), for the plaintiff.—The order for the goods having been given by Mare & Co., the plaintiff had a lien upon them at the time the deed of inspectorship was executed. Then on the 1st February the plaintiff wrote to Mare & Co. that the goods were ready, and he awaited their instructions as to delivery; but he did not say that he would deliver them without

(*a*) 2 M. & W. 484. (*b*) 8 H. L. 268.
(*c*) 1 Har. & Ruth. 117.

payment. [*Blackburn*, J.—Nor does he say that he will not.] On the 3rd February the defendants sent an order, signed by them, for the delivery of the goods, and the plaintiff, having a right to hold them as unpaid vendor, would naturally suppose that the defendants, by requesting their delivery, undertook to pay for them. [*Montague Smith*, J. —The defendants signed the order in the mode which is usual when agents do not wish to make themselves personally responsible.] It is evident that the goods were delivered on the personal responsibility of the defendants, for the invoice was made out to them. It is true that the deed of inspectorship does not assign the debtor's estate and effects to the defendants, but they have an entire control over the business, and the application of the monies received from it. It is conceded that inspectors may so act as not to make themselves personally responsible, but the question here is, whether or no there is evidence that the defendants have pledged their credit. Why should they sign a new order, unless it was to quiet the apprehensions of the plaintiff? If they merely meant to notify their approval of the order given by Mare & Co. they would have done so in a different form. [*Blackburn*, J.—Mare & Co. having become insolvent, the plaintiff would not have delivered the goods without the approval of the inspectors; but you must go further and establish that by signing the order "*for* Mare & Co." they intended not only to express their approval, but personally to contract.] If they did not intend to do so, why did they not let Mare write; or themselves simply write, "In answer to your letter of the 1st February, we request you to deliver the goods immediately"? [*Blackburn*, J.—Do they, by writing "Wigg & O'Beirne *for* Mare & Co.," bind themselves any more than if, with Mare's authority, they had signed "C. J. Mare & Co."?] It is admitted that, if no firm of

1866.
REDPATH v. WIGG.

Mare & Co. existed, the defendants would be liable, and the insolvency of Mare & Co. is equivalent to the non-existence of the firm. *Cox* v. *Hickman* (*a*) and *Bullen* v. *Sharp* (*b*) have no application to this case. The defendants are not partners with Mare & Co., but principals. [*Blackburn*, J.—The very object of signing for a third person is to indicate that such person, not the person signing, contracts.] There is no authority on the subject; but taking the letter of the 3rd February in connection with the previous correspondence, and the fact that there was no necessity for the defendants to give a fresh order, it is submitted that there was evidence of an intention on the part of the defendants to pledge their credit.

Matthew replied.

Cur. adv. vult.

The judgment of the Court was delivered, in the following Trinity Vacation (June 18), by

WILLES, J.—This was an action for goods sold and delivered by the plaintiff, who carried on business as an iron-founder under the firm of Redpath and Leigh, against the inspectors of C. J. Mare & Co., who carried on business as a ship builder under the firm of C. J. Mare & Co. The deed of inspectorship was dated the 3rd of January, 1865, and was intended to operate under the Bankruptcy Act, 1861.

The goods were ordered by Mare, and the order accepted by the plaintiff before the deed. The stoppage of payment took place before they were ready for delivery.

On the 1st February, 1865, the plaintiff wrote to C. J. Mare & Co. stating that the goods were ready, and awaited further instructions as to delivery.

(*a*) 8 H. L. 268. (*b*) 1 Har. & Ruth. 117.

On the 3rd of February, 1865, an order for delivery s sent to the plaintiff, signed by the defendants, as lows:—

"No. 29. "Northfleet Dockyard,

"Messrs. Redpath & Leigh, "3rd Feb. 1865.

"Please send three of Redpath's patent iron pumps" ecribing the goods previously ordered].

"George Wigg.

"J. Lyster O'Beirne.

"for C. J. Mare & Co.'

Upon this order being given the goods were, on the 13th bruary, 1865, sent in to Mare's place of business, together th an invoice making the inspectors debtors. Whether s invoice came to their knowledge did not appear; and was soon afterwards returned with a request that C. J. are & Co. should be made the debtors instead of the ipectors. This required alteration was accordingly ide by one of the plaintiff's clerks and the invoice turned, but as the plaintiff at the trial stated without s knowledge, so that the invoice may be considered out of e case; and the question for our decision is, whether the der of the 3rd February, and the supply of the goods ereunder, furnishes any evidence of liability on the part the defendants.

Upon this it is first to be observed that there was no ggestion of fraud. The deed, when put in, appeared to an ordinary transaction, the bona fides of which was t impeached. Nor was the action founded upon any srepresentation as to the authority from Mare to give s order in the name of C. J. Mare & Co. This order on the face of it purported to be given by the defendants a named principal, on whose behalf, and not for themves, they professed to act. Had the order been signed, e the original one, by a clerk of C. J. Mare & Co., no

1866.
REDPATH
v.
WIGG.

liability could have been imposed upon such clerk, except by shewing want of authority from the alleged principal. And the burthen of proving such want of authority would have rested upon the plaintiff. No such evidence was offered or suggested to exist in this case.

The plaintiff, therefore, cannot rely upon any ostensible liability of the defendants, but must shew that the capacity which they actually filled was that of Mare's real principal, so as to be, in substance, themselves C. J. Mare & Co. for the time.

The question whether the inspectors are to be considered as principal trader and the debtor only a servant or agent of theirs, is one of great and general importance, so far as we are aware quite novel, and one the decision of which in the affirmative may seriously interfere with arrangements under inspectorship, inasmuch as it must needs deter responsible persons from undertaking the office. It would of course be possible to suppose a case in which the debtor became by the arrangement a mere servant acting only for the benefit of others, or in which the business was intended to be carried on at the expence of new creditors who might be deceived into giving credit to the debtor, but really for the advantage of the old ones. Such a case, should it arise, will admit of an easy solution as one of fraud.

On the other hand, there may be a good business with a temporary embarrassment, where the intention is to keep together the debtor's business in his name (which may be an important element in its value), and for his permanent benefit as well as the temporary benefit of his creditors, where with that view a letter of license is granted enabling him to carry on the business and to retain it for himself after he has paid his creditors, who stipulate, however, that until the debts are discharged the business shall

be carried on under the inspection and control of persons appointed by them, who shall receive the proceeds, pay the current expenses of the business, and distribute the surplus. In such a case the object seems to be to maintain the debtor in the position he previously occupied as the person principally interested in the business; and it seems no more reasonable to hold the inspectors liable, as being his masters, than it would be to say that a confidential clerk, to whose opinion his employer habitually defers, or to whom he entrusts the entire conduct of the business, is as to third persons the principal. The difference between such cases and the present is that there the principal might resume the control at any time, whereas in the case before us Mare could only do so upon payment of the debts, or a composition agreed to by a majority of the creditors, or by breaking his contract to submit to inspection, which he might do, if he thought proper, at the risk of damages and loss of the benefit of the deed. But the cases put by way of illustration clearly shew that the mere fact of inspecting and controlling another person's business does not involve responsibility for debts contracted therein by him or in his name; and as for this contract it cannot in favour of third parties create such responsibility unless it makes the inspectors the real principals.

In order to ascertain the precise position which the defendants occupied, it will therefore be proper to refer to the terms of the deed.—(His Lordship then stated the material parts of the deed.)—It thus appears that the intention of the parties was, instead of pressing Mare for immediate payment or liquidation, to allow him to continue his business in such a manner, if possible, that after paying off his creditors he should have the option of going on for himself; that the business was to remain his, subject to his clearing off his debts; that the inspectors were

1866.
REDPATH v. WIGG.

to advise and control him, to receive the proceeds (business, and after paying current expenses (incl such debts as the plaintiff's), and not before, to divi surplus amongst the old creditors. They were not tc a share of the profits, and were only to receive their costs and expenses. The deed contains no power inspectors to take the management of the business exclusion of Mare: so that they could not dismiss hi master or principal might his servant or agent.

Under these circumstances we think it cannot be tained that the inspectors became Mare's masters or cipals in the business, or liable as such for debts in by Mare & Co.

Nor can the plaintiff justly complain of this result. form of the order gave him notice that Mare & Co his customers; and to that firm, and to the trust fo ment of current expenses, he must be content to look

The direction of the learned Judge that, und above circumstances, there was evidence of liability part of the defendants, was therefore erroneous, and de novo must be awarded.

Trial de novo accordin

Exchequer Reports.

TRINITY TERM, 29 VICT.

1866.

LORD COLCHESTER and Others *v.* KEWNEY.

May 28.

The 38 Geo. 3, c. 5, s. 25, which exempts from land tax "any hospital" in respect of its scite, applies only to hospitals in existence at the time that Act passed.

Semble, that the word "hospital," in that Act, is used in a popular sense only, and that any institution which, though not in a strictly legal, might in a popular sense be called a hospital, might claim exemption.

BY consent of the parties and order of a Judge, the following case was stated for the opinion of this Court, without pleadings:—

The plaintiffs are three of the Royal Commissioners of the Patriotic Fund, and the trustees of the said Commissioners; and the defendant is the collector of land tax for the parish of Wandsworth.

By a Royal Commission, issued by her Majesty's command the 7th day of October, 1854, addressed to the Prince Consort, the plaintiffs, and other noblemen and gentlemen, after reciting (amongst other things) that during the then present war many soldiers, sailors and marines, serving in her Majesty's armies and fleets, had gallantly fallen in battle, or by other casualties, during war: And that it had been represented to her Majesty that many of

Commissioners appointed by the Crown to administer funds subscribed by the public for the relief of the widows and orphans of soldiers, sailors and marines, who died in battle, purchased land charged with land tax, and built upon it and endowed an asylum for the support, maintenance and education of three hundred daughters of such soldiers, sailors, and marines.—*Held*, that the land having been charged with land tax, would still be chargeable in the hands of the Crown, even if directly purchased for the Crown.

But, *semble*, that even if this asylum had been in existence at the time the 38 Geo. 3, c. 5, passed, it would not have been exempt as Crown land.

Semble also, that the asylum was not a "hospital" in the popular sense, which is rather an institution for the relief of the sick or aged than for the maintenance and education of children.

1866.
LORD COLCHESTER v. KEWNEY.

her subjects were desirous of testifying their loyalty by a just and generous benevolence towards the widows and orphans of her Majesty's soldiers, sailors and marines who had been killed, or might thereafter die, amidst the ravages and casualties of war, and also by their gifts and subscriptions to contribute towards the succouring, educating and relieving those who, by the loss of their husbands or parents in battle, or by death in active service in the then present war, were unable to maintain themselves, and that it was expedient that public measures should be taken, and that preparation should be made for the safe keeping and beneficial application of the sums of money which might be subscribed for the purposes aforesaid: her Majesty authorized and appointed the Prince Consort, the plaintiffs and the said other noblemen and gentlemen her Royal Commissioners to make inquiry into the best mode of aiding the loyalty and benevolence of her subjects, of ascertaining the best means by which the gifts, subscriptions and contributions of her subjects could be best applied according to the generous intention of the donors thereof, and from time to time to apply the same as any three or more of them should think fit or direct, either for the immediate relief of such special objects of such destitution as might come within the meaning and purpose of such benevolence, or for any of the purposes aforesaid to increase, extend or make additions to any of the royal or other charitable institutions already founded for similar purposes, and further to apply all such monies in such manner as to the said Commissioners, or any three or more of them, should seem fit in the premises, so that they did in all things secure the most impartial and beneficent distribution of all such monies as might be received. And her Majesty further commanded that the fund should be called the "Patriotic Fund."

The Royal Commissioners proceeded to act under the commission, and collected large sums of money thereunder, and, after having appropriated a large portion of the Patriotic Fund towards the more immediate and pressing relief of those for whose benefit the Royal Commission was issued, they considered it in accordance with their instructions from her Majesty to make a further provision for the objects of their care, in such a manner as would confer permanent benefit on the two services, and they decided to establish and endow an institution for the education of three hundred daughters of soldiers, sailors and marines.

In pursuance of such purpose, the Commissioners purchased a piece of waste land on Wandsworth Common, being part of the manor of Battersea and Wandsworth, in the county of Surrey, which land, by deed made the 24th June, 1857, was conveyed by Lord Spenser, then being seised in fee thereof, to the plaintiffs, their heirs and assigns, to the intent that the land might be held free from all rights of common, and in trust for the Royal Commissioners of the Patriotic Fund.

The Royal Commissioners built upon the land, and endowed an asylum for the support, maintenance and education of three hundred daughters of the said soldiers, sailors and marines, called "The Royal Victoria Patriotic Asylum." The land was purchased and the asylum wholly built and endowed out of the funds of the said Patriotic Fund, and from no other source whatever.

The asylum, with its buildings and appurtenances, is used solely and exclusively for the purposes for which it was originally designed. The present inmates are daughters of non-commissioned soldiers, sailors and marines who lost their lives in the late war with Russia, or in consequence of that war. They are lodged and boarded in the

1866.

LORD COLCHESTER v. KEWNEY.

said asylum, and are entirely maintained, clothed and educated there at the sole cost of the "Patriotic Fund," a portion of which has been specificially appropriated as an "Endowment Fund," and invested in public securities. All the expenses of and incidental to the said hospital are defrayed and paid out of the income of the said "Endowment Fund," so far as it will go; and if the expences exceed such income, the balance is paid out of the "Patriotic Fund."

In August, 1863, the assessors of land tax for the parish of Wandsworth charged the said asylum for and in respect of its scite, and of the buildings within its walls and limits to the land tax for one year and a half in the sum of 37*l.* 10*s.* The plaintiffs appealed to the Local Land Tax Commissioners against the assessment; but they determined that the plaintiffs were liable to be assessed, and that, in their opinion, the said asylum is not a hospital within the meaning of the 38 Geo. 3, c. 5, or a royal charity. Notwithstanding such decision the plaintiffs refused to pay the assessment, and the defendant distrained a certain chattel of the plaintiffs for the purpose of enforcing payment, whereupon this action was brought.

The question for the opinion of the Court is, whether or not the said asylum is absolutely exempt and free from being assessed and rated to the land tax for or in respect of the scite thereof, and of the buildings within the walls and limits thereof

If the Court shall be of opinion that the said asylum is not liable to be assessed and rated to the land tax for or in respect as aforesaid, judgment is to be entered for the plaintiffs. If the Court shall be of opinion that the same is liable to be assessed and rated to the land tax, judgment is to be entered for the defendant.

The Solicitor General (*Prideaux* with him) argued for the plaintiffs (*a*).—First, this asylum is exempt from the land tax as a "hospital" within the meaning of the 38 Geo. 3, c. 5. The first statute which contained explicit directions for collecting and assessing the land tax was the 4 Wm. & M. c. 1. Most of the provisions of that statute were embodied in acts of parliament annually passed to continue the tax, until the year 1797, when the 38 Geo. 3, c. 5, passed. The land tax assessed under that Act was made perpetual by the 38 Geo. 3, c. 60, but the latter Act was repealed by the 42 Geo. 3, c. 116, ss. 1, 3, except so far as it rendered the 38 Geo. 3, c. 5, perpetual. The question therefore depends on the construction of the 38 Geo. 3, c. 5. The 3rd section of that Act imposed a tax, after the rate of 20*s.* in every 100*l.*, upon ready money, debts, goods, wares merchandise or other chattels or personal estate (*b*), and a tax after the rate of 4*s.* in the pound on the annual amount on public offices or employments of profit, salaries, &c. The 4th section of that Act imposed a rate not exceeding 4*s.* in the pound on manors, messuages, lands, quarries, &c., and all other hereditaments. The 25th section (*c*) provided that nothing in that Act

(*a*) May 28. Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.,

(*b*) This tax was repealed by the 3 & 4 Wm. 4, c. 12: and by the 6 Geo. 4, c. 9, s. 21, it is declared that the duties on salaries, offices and employment of profit shall not be charged upon any salaries, &c., especially exempted from payment of taxes by any act of parliament.

(*c*) Sect. 25:—"Provided that nothing in this Act contained shall extend to charge any college or hall in either of the two universities of Oxford or Cambridge, or the colleges of Windsor, Eton, Winton or Westminster, or the corporation of the governors of the charity for the relief of the poor widows and children of clergymen, or the college of Bromley, or any hospital in England, Wales, or Berwick-upon-Tweed, for or in respect of the scites of the said colleges, halls, or hospitals, or any of the buildings within the walls or limits of the said colleges,

1866.

LORD COLCHESTER v. KEWNEY.

contained shall extend to charge any college or hall in the Universities of Oxford or Cambridge, &c., "or any hospital in England," &c., "in respect of the scites of the said college, halls or hospitals," "or shall extend to charge any other hospitals or almshouses in England, &c., for or in respect only of any rents or revenues which, on or before the 25th March, 1693, were payable to the said hospitals or almshouses, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and almshouses only." Though the word "almshouses" is first introduced in the latter part of that section, the word "hospital" in the former part must include almshouses, otherwise this absurdity would follow, that almshouses would be liable to pay the tax in respect of their scites, but not in respect of their rents or revenues. The 26th section (*a*) shews that the legislature used the word

halls, or hospitals; or any master, fellow, scholar, or exhibitioner of any such college or hall, or any reader, officer or master of the said universities, colleges or halls; or any masters or ushers of any schools in England, Wales, or Berwick-upon-Tweed, for or in respect of any stipend, wages, rents, profits, or exhibitions whatsoever arising or growing due to them in respect of the said several places or employments in the said universities, colleges, or schools; or to charge any of the houses or lands which, on or before the 25th day of March, 1693, did belong to the scites of any college or hall in England, Wales or Berwick-upon-Tweed, or to Christ's Hospital, Saint Bartholomew, Bridewell, Saint Thomas and Bethlehem Hospitals, in the city of London and borough of Southwark, or any of them, or to the said corporation of the governors of the charity for the relief of the poor widows and children of clergymen, or the college of Bromley; or shall extend to charge any other hospitals or almshouses in England, Wales, or Berwick-upon-Tweed, for or in respect only of any rents or revenues which, on or before the said 25th day of March, 1693, were payable to the said hospitals or almshouses, being to be received and disbursed for the immediate use of and relief of the poor of the said hospitals and almshouses only."

(*a*) Sect. 26.—"Provided that no tenants that hold or enjoy any lands or houses by lease or other grant from the said corporation, or any of the said hospitals or

"hospital" in the 25th section, as synonymous with "almshouse." In the 27th section (*a*) the word "schools" is introduced in conjunction with hospitals and almshouses. [*Martin*, B.—Does the 25th section exempt any other than hospitals then existing?] When the 42 Geo. 3, c. 116, s. 3, made perpetual the charges and exemptions contained in the 38 Geo. 3, c. 5, if the legislature had intended that in future institutions of this kind should be subject to the tax, they would have said so. [*Pollock*, C. B., referred to *All Souls College* v. *Costar* (*b*).] There the college purchased land of a parish under a private act of parliament, which provided that the college should pay all taxes to which the premises then were or should thereafter be subject; and Lord *Alvanley*, C. J., in delivering the judgment of the Court, said that this stipulation was introduced for the express purpose of guarding against the very exemption which was then set up. [*Bramwell*, B.—The first part of the 25th section exempts the colleges, halls and hospitals mentioned in respect of *their scites*; the latter part of the section exempts all *other* hospitals or almshouses in respect of *their rents or revenues*. *Martin*, B.—The 26th (*c*), 27th

almshouses, do claim or enjoy any freedom, exemption or advantage by this Act, but that all the houses and lands which they so hold shall be rated and assessed for so much as they are yearly worth over and above the rents reserved and payable to the said corporation, or to the said hospitals or almshouses, to be received and disbursed for the immediate support and relief of the poor of the said hospitals and almshouses."

(*a*) Sect. 27.—"Provided always that nothing in this Act contained shall be construed or taken to discharge any tenant of any of the houses or lands belonging to the said colleges, halls or hospitals, almshouses, or schools, or any of them, who by their leases or other contracts are and do stand obliged to pay and discharge all the rates, taxes and impositions whatsoever, but that they and every of them shall be rated and pay all such rates, taxes, and impositions, anything in this Act contained to the contrary notwithstanding."

(*b*) 3 Bos. & P. 635.

(*c*) *Ante*, p. 450.

1866.

LORD COLCHESTER v. KEWNEY.

28th (*a*) and 29th (*b*) sections have reference to the latter part of the 25th section.] The word "hospital" is used in its popular signification. Its definition in Johnson's Dictionary is "a place built for the reception of the sick or support of the poor." It is true that in *The Case of Sutton's Hospital* (*c*) Lord *Coke* states that as the poor of the hospital were not incorporated, it was no legal hospital. But in Co. Litt., 342 a, it is said:—"Nota: of hospitals some are corporations aggregate of many; as of master or warden, &c., and his confrères; some where the master or warden hath only the estate of inheritance in him, and the brethren or sisters power to consent, having college and common seal: some where the master or warden hath the state in him, but hath no college or common seal." In a comment on this passage in Kyd on Corporations, vol. 1, p. 26, the author observes that there is no difference in legal

(*a*) Sect. 28.—"And in case any question hath been or shall be made, how far any lands or tenements, belonging to any hospital or almshouse in England, Wales or Berwick-upon-Tweed, not exempted by name out of this Act, ought to be assessed and charged to the land tax; be it enacted and declared, that the same shall be determined by the said Commissioners, or any three or more of them, or the major part of them, then present, upon appeal before them at the day or days by them appointed for the hearing and determining of appeals, whose determination in such case shall be final."

(*b*) Sect. 29.—"Provided always, and it is hereby enacted, that all such lands, revenues, or rents belonging to any hospital or almshouse, or settled to any charitable or pious use, as were assessed in the fourth year of the reign of their late Majesties King William and Queen Mary, shall be and are hereby adjudged to be liable to be charged towards the payment of this present aid; and that no other lands, tenements, or hereditaments, revenues, or rents whatsoever, then belonging to any hospital or almshouse, or settled to any charitable or pious uses as aforesaid, shall be charged, taxed or assessed by virtue of this present Act towards the said sum to be raised in England, Wales and Berwick-upon-Tweed as aforesaid; anything herein contained to the contrary notwithstanding."

(*c*) 10 Rep. 22 b, 30 b.

consideration between hospitals which have a common seal and colleges either in the universities or out of them; that there are other hospitals, which, having no common seal, cannot properly be considered as corporations, the master or warden being merely a trustee for the house; and that there are other hospitals where the poor who are the object of the founder's bounty are not themselves incorporated, but the corporate succession is vested in trustees, who have no beneficial interest, but are only instruments to effectuate the purposes of the institution, such as the Charter House, and most other hospitals of modern creation."

Secondly, the scite of this asylum is land belonging to the Crown, and therefore the case falls within the principle of the decision in *The Attorney General* v. *Hill* (*a*). It is a general proposition of law that the Crown is not bound by a statute unless expressly named. The plaintiffs are mere trustees, appointed by the Queen, and if she revoked the commission, the plaintiffs would hold the land in trust for the Queen.

Mellish (*Philbrick* with him), for the defendant.—First, this institution is not a "hospital" either within the strict legal or the popular signification of that word. Hospitals are either ecclesiastical or lay. The former were given to the Crown by the 27 Hen. 8, c. 28, and 37 Hen. 8, c. 13: Co. Litt. 342 a. It is not contended that a "hospital" necessarily implies a corporation; the ordinary meaning of the word is "a place built for the reception of the sick or the support of the poor." But this institution does not come within that definition, for it is devoted to the education of children. It is, in truth, an endowed school, and it could never have been intended that every endowed school should be exempt from the tax in respect of its scite.

(*a*) 2 M. & W. 160.

1866.

LORD COLCHESTER v. KEWNEY.

Secondly, assuming that this institution is a hospital within the meaning of the 38 Geo. 3, c. 5, it is not exempt from the land tax, because the exemption in that Act is confined to hospitals in existence at the time the Act passed. [*Channell*, B.—The 29th section (*a*) expressly provides that hospitals assessed under the 4 & 5 Wm. & M. c. 1, shall not be exempt.] Whilst the Land Tax Acts were annual the amount would be assessed with reference to the property liable to be taxed or exempt; but when the 38 Geo. 3, c. 5, made the tax perpetual, and imposed a certain fixed charge on the several counties and places therein mentioned, if hospitals subsequently erected were to be exempt, an additional burthen would be cast upon the other property. [*Bramwell*, B.—When the legislature said that no hospital shall be charged in respect of its scite, they must have meant that to apply only to existing hospitals of which they had knowledge and could calculate the effect of the exemption.] It would clearly be so when the tax was imposed annually, and the same construction must be put on the 38 Geo. 3, c. 5, which made the tax perpetual. The object of perpetuating it was to enable it to be redeemed, which was provided for by that Act. The authorities throw little light upon the subject. In the case of *All Souls College* v. *Costar* (*b*) the buildings had been made part of the college after the passing of the 4 & 5 Wm. & M. c. 1, and before the 38 Geo. 3, c. 5, and the Court declined to express any opinion with respect to colleges erected since the land tax was made perpetual.

Thirdly, the Crown has no legal estate or benefic[illegible] interest in this institution. It is to all intents and purpo[illegible] a charity supported by the voluntary contributions of p[illegible]vate individuals. It is true that in one sense the Crown considered as having an interest in all charities; inasmu[illegible]

(*a*) *Ante*, p. 452. (*b*) 3 Bos. & P. 635.

as, if their funds were diverted the Attorney General might take proceedings on behalf of the Crown; but that is not such an interest as to exempt them from the land tax.

The Solicitor General, in reply.—This is clearly a hospital within the definition of that word in Webster's Dictionary, viz., "a building appropriated for the reception of seamen, soldiers, foundlings, &c., who are supported by the public, or by private charity." The 38 Geo. 3, c. 5, s. 25, has a prospective operation, and its meaning is that the particular description of property thereby exempted shall not in future be subject to that tax. If a poll tax was imposed with an exemption of a certain class of individuals, the exemption would apply to all future individuals of that class.

Cur. adv. vult.

The judgment of the Court was delivered in the following Trinity Vacation (June 26), by

CHANNELL, B.—The question for our decision in this special case is whether the scite of the "Royal Victoria Patriotic Asylum" is liable to be assessed to land tax. Exemption is claimed by the plaintiffs, who are the trustees of the asylum, on two grounds:—First: that this asylum is a hospital, and therefore exempt by the 25th section of the 38 Geo. 3, c. 5. Secondly: that it is Crown land, and therefore exempt. On the part of the defendant these propositions are disputed, and it is further contended that, even if this were a hospital within the meaning of that word in the section in question, yet it was not in existence in the 38th year of Geo. 3, and that the exemption only extends to institutions then existing.

1866.

LORD COLCHESTER v. KEWNEY.

The facts are fully set out in the case, and it will not requisite further to refer to them. It will however necessary to examine the statutes imposing the land tax, shew how the law now stands, and the successive chan that have been made.

The tax appears to have been first imposed as an ann tax in the time of William and Mary, and by several suc sive acts of parliament to have been continued. Those A imposed not only the tax now known as the land tax, b also a tax on personal property and salaries somewh analogous to the present income or property tax, and fro the time of the 4 & 5 Wm. & M. they contained a clau exempting hospitals from its operation in somewhat simil terms to that hereafter referred to. These annual Ac appear to have been passed in much the same terms un 1797, the date of 38 Geo. 3, c. 5, the last annual Act.

The 25th section of that Act provides that nothing the Act shall extend to charge any college or hall in eith University, or certain colleges named, or the Corporati of the Sons of the Clergy, or the College of Broml "or any hospital in England, Wales, or Berwick up Tweed, for or in respect of the scites of the said college a halls, or hospitals, or any of the buildings within the wa or limits thereof." The section then proceeds to prov for the exemption of persons connected with such in tutions from the tax on their salaries, and also for exemption of lands which in 1692, the date of the 4 & 5 Wm. & M., had formed part of the site of any c lege, or of certain specified institutions. And also, t the Act should not charge "any other hospitals or al houses" in respect of lands the rents of which in 1 had been applicable solely to the relief of the inmates.

Now the first question that arises is whether, if t asylum had been in existence at the passing of this A

the trustees could have claimed exemption. It is objected that they are not incorporated, and that there can be no hospital without incorporation. And no doubt the old authorities tend to shew that a hospital must be incorporated. But they shew something more, for Lord Coke says, in *Sutton's Case* (*a*), that there is no legal hospital except where the poor persons benefitted are themselves incorporated, and he says that where the corporate succession is vested in trustees to effectuate the purposes of the institution, that is no legal hospital. It seems, however, tolerably clear that a legal hospital in that sense is not meant when the word hospital is used in this section, for towards the end of the section the words "other hospitals" are followed by the names of some particular hospitals, some of which seem not to be incorporated in such a manner as to make them legal hospitals under this definition. If then we understand that the word "hospital" in the section does not mean strictly a legal hospital is there any reason for supposing there need be any incorporation at all?

It seems rather more reasonable to hold that the word is used in a popular sense only, and that any institution which, though not in a strictly legal, might in a popular sense be called a hospital, might claim exemption. But some doubt must arise whether even upon this view this institution would be a hospital, by which word we understand rather an institution for the relief of the sick or aged than for the maintenance and education of children. We do not speak of a hospital for orphans.

But, upon the whole, we are inclined to think that if this institution had been in existence at the time of the passing of the Act 38 Geo. 3, c. 5, it might have claimed exemption. But this is not so clear as to make it unnecessary to con-

(*a*) 10 Rep. 22 b.

1866.

LORD COLCHESTER v. KEWNEY.

sider the position of a subsequently founded hospita this character and the course of the subsequent legislat

In the same session (38 Geo. 3) was passed ano Act (chap. 60), which enacted, that the sums charged the previous Act (chap. 5) on counties, towns and pla in respect of land within the same, to be raised, levied paid within a year, should be raised, levied and paid ye for ever. And the several powers, provisions, clauses, of the former Act should, except as in the second altered or varied, be in full force as if repealed and enacted in that Act, but that all this should be subjec redemption as therein provided. By subsequent stat the provisions for redemption were from time to t altered, repealed, re-enacted and consolidated, but scheme remained the same, and the alterations were pri pally of the machinery and regulations for carrying it effect.

Now, one object of the legislature in passing the was to support the public credit by imposing a fixed ch on land, on the strength of which money could be borro and to relieve the country of a portion of the existing on advantageous terms.

Provision was made for redemption of the tax by tr ferring to the Commissioners for the reduction of national debt a sum in consols the income of which sh exceed by one-tenth the tax to be redeemed.

At this time the funds were greatly depreciated as pared with other securities, and especially with land.

A permanent charge of 10*l.* a year upon land w therefore be of greater value in the market than a producing 11*l.* a year in the funds. It would, therefo the then imposed tax was to be permanent, be to the terest of landowners to redeem; and upon their doir the revenue would be benefitted to the extent of one-t

of the tax redeemed. It was therefore the policy of the legislature to encourage redemption. That this was so we see from the extensive powers given to persons having a limited interest only to raise money to redeem the tax, from other inducements held out to landowners to redeem, and from the fact that upon refusal of the owners third persons might purchase the tax, retaining it as a charge payable to themselves. But no one would have redeemed the tax unless it had been made a permanent charge upon the land not likely ever to be much less in amount, and not to be got rid of except by redemption. If that were the case the redemption would necessarily increase the market value of the land, and would do so, as we have shewn, to a greater extent than the sum required to be expended in the redemption. If, however, the land was to be liable to the tax in the hands of one purchaser but not of another, the value of the land to sell would not be increased in proportion to the outlay for redemption. To carry out the policy of the Act, therefore, we should expect to find that no new or shifting exemptions could arise or come into effect after the tax became permanent.

The effect of the Acts on several points was explained in *The Queen* v. *The Land Tax Commissioners* (*a*). Upon each district separately assessed a fixed quota was to be charged. That was not to be altered. Although before levy the amount of tax redeemed within the district was to be deducted, and the remainder only levied, this was to be levied on the lands not exonerated by redemption. These lands were to be assessed yearly by an equal pound rate sufficient to produce the required amount.

We see therefore from this, in the first place, that the amount of tax payable on any particular portion of land would increase or decrease not according as the value of

(*a*) 2 E. & B. 694.

1866.

LORD COLCHESTER v. KEWNEY.

land increased or decreased absolutely, but according as it increased or decreased relatively to the other lands in the district not exonerated. And as any owner who was about to improve his land to such an extent as to have any effect on the rest of the district might be expected first to redeem the tax, no person could ever expect that the amount of tax upon his land would ever be sensibly diminished, although he would know that if he improved without taking the precaution of redeeming the tax would be increased. We see then that this inducement for redemption, viz., that no loss was likely to be incurred, was actually held out by the legislature. In the next place we see that if any portion of land chargeable with tax came into the hands of a proprietor having a valid claim of exemption, a greater burden would be thrown upon the remainder of the district, for the amount to be raised would be the same as before, and the land on which it was to be charged less. This of itself is a strong argument for supposing that all exemptions must attach at the time these quotas were thus permanently fixed, and must in all changes of ownership follow the land and not the proprietor. As long as the tax was imposed annually, although the legislature in fact imposed the same quota on such district as they had done before, it must be taken that this was done deliberately and after consideration of all the changes that had taken place in the ownership of property since the last Act. We find in two cases arising under the temporary Acts, viz., *Harrison* v. *Bulcock* (*a*) and *All Souls College* v. *De Coetar* (*b*), that it has been held with respect to additions to hospitals and colleges which had been made since exemption was first given, but before the Act imposing the tax under which the assessment complained of was made, that such additions were exempt. The distinction between

(*a*) 1 H. Bl. 68. (*b*) 3 Bos. & Pul. 635.

those cases and the present was noticed in one of them, *The All Souls College Case*, by the Chief Justice of the Common Pleas, Lord *Alvanley*, who says that with respect to colleges founded since the land tax was made perpetual he would say nothing. The inference we are disposed to draw from what was said in that case seems to us to be that the important thing to see in construing the exemption is, whether or not the land was within the exemption at the time of the passing of the Act imposing the tax on all land. In that case it was, in the present it was not.

Considering therefore the hardship on other proprietors in the district which would be caused by shifting exemptions coming into operation on a change of ownership, together with the evident policy of the Act to make the charge on land a permanent one with a view to encouraging its redemption for the benefit of the revenue, we think we should hold that there can be no exemption in case of lands not exempt when the tax was made permanent.

The same construction would, we think, necessarily be drawn from a strict construction of words of the exception, for "any hospital" must mean any existing hospital.

Then the further question arises, whether this asylum is exempt as Crown land, but to this we think the same reasoning will apply. There is, indeed, very great doubt whether, supposing this asylum to have been in existence in 1797, it would have been exempt on this ground, viz. as Crown land. It is true the Commissioners were appointed by the Crown, and to some extent for public purposes, but it was mainly to administer funds contributed for a particular purpose by individuals. And all taxes or other imposts charged upon them would be payable from these funds and not from the

1866.
LORD COLCHESTER v. KEWNEY.

public purse. But, however that may be, we think that these lands having been chargeable with land tax when belonging to Lord Spencer, as we presume to have been the case, although it is not distinctly stated, would be chargeable still in the hands of the Crown, if directly purchased for the Crown. The case quoted to shew that Crown lands are not chargeable with land tax (*Attorney General* v. *Hill* (*a*)) seems to us to favour this view rather than the contrary, for it is distinctly found in the case, p. 163, that the assessment complained of on Deptford Dock Yard was for land which had formed part of the dock yard when the land tax was made perpetual.

This shews that in the opinion of the late Mr. Justice *Wightman*, who was then counsel for the Crown, it was a material point in order to make out the exemption. It may be observed that the effect of holding that the Crown must pay the land tax chargeable on land which they may purchase is not really to tax the Crown, but merely to make the Crown pay the market price for land purchased. If the tax had been previously redeemed, of course the purchase money would have been larger; and the difference between the purchase money in the two cases would be gained by the Crown at the expense of the other proprietors of the district, not at the expense of the public revenue, whenever it purchased lands on which the tax had not been redeemed, if the exemption claimed were to be allowed. If there were any provision for reducing the amount of the tax to be levied on the district, of course the case would be different.

There may be some difficulty in enforcing payment against the Crown, and we do not say that all or even any of the remedies provided for ordinary cases could be re-

(a) 2 M. & W. 159.

sorted to. We do not, however, think that this shews that the lands would not be still chargeable, or that an assessment in which part of the quota to be levied on the district was assessed on Crown lands chargeable before they became Crown lands would not be a good one.

For these reasons we think our judgment should be for the defendant.

Judgment for the defendant.

D'ARCY v. THE TAMAR, KIT HILL and CALLINGTON RAILWAY COMPANY.

June 8.

A contract under the seal of an incorporated Company is not valid unless the seal was affixed with the authority of the directors meeting together as a board.

Therefore, where, by the special Act of an incorporated Company three directors were a quorum, and the secretary obtained at one time the authority of two directors to seal a bond for money due to the engineer of the Company, and at another time the authority of another director:—*Held*, that the bond was not the deed of the Company.

DECLARATION.—For that the defendants, on the 29th day of September, 1864, by their bond, sealed with their common seal, acknowledged themselves to be held and firmly bound to the plaintiff in the sum of 2000*l.*, to be paid to the plaintiff.—Breach: non-payment.

Plea.—Non est factum.

At the trial, before *Martin*, B., at the Middlesex Sittings after last Easter Term, the following facts appeared.—The defendants were a Company incorporated by the 27 & 28 Vict. c. ccxciv., and the plaintiff was the engineer of the Company. The bond in question, which was dated the 29th September, 1864, was sealed with the seal of the Company, and countersigned by the secretary.. Three directors authorized the secretary to affix the seal to the bond, but the authority was given by two directors at one time and by the other director at another time. No entry of this bond was made in the books of the Company. The plaintiff

1866.
D'ARCY
v.
TAMAR, &c.,
RAILWAY CO.

assigned the bond to one Hall for money advanced, and the assignment was registered by the secretary. On the 13th September 1864, there had been a resolution of the directors to issue "Lloyd's Bonds" (*a*) to the amount of 15,000*l.* It appeared that there were four directors. The 24th section of the 27 & 28 Vict. c. ccxciv. enacts: "The number of directors until the first general meeting of the Company after the passing of this Act shall be eleven, and afterwards the number shall not exceed six, but the Company may from time to time reduce or increase the number of directors within the limits of three as the minimum, and six as the maximum, and the quorum of a meeting of directors shall be three, unless the number of directors is reduced to three, and then until the number is raised the quorum shall be two." This Act incorporated the "Companies Clauses Consolidation Act, 1845."

It was submitted on behalf of the defendants that the bond was not the deed of the Company, inasmuch as the secretary was not lawfully authorized to affix the seal of the Company to it: and no minute of it was made in the books of the Company, as required by the 98th section of the Companies Clauses Consolidation Act, 1845. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendants to move to enter the verdict for them.

Montagu Chambers, in the present Term, obtained a rule nisi accordingly, or for a nonsuit; against which

Patchett and *Thesiger* now shewed cause.—The bond was produced with the seal of the Company affixed to it, and it is not competent for them, under the plea of non est factum, to set up the defence that the seal was irregularly affixed. [*Channell*, B.—The plaintiff was bound to prove that the deed was the deed of the Company.] It was

(*a*) As to these bonds, see Hodges on Railways, p. 141, 4th ed.

ıfficient for the plaintiff to produce the bond with the :al of the Company affixed to it, and the onus was on ıem to prove that the seal was affixed without authority.)n the 13th September, 1864, a resolution of the board f directors was passed authorising the secretary to issue onds. [*Martin*, B.—That resolution did not authorize ıe making of this bond.] There was no need of a sepa- ıte resolution to justify the secretary in sealing each bond. he object of the 98th section of the Companies Clauses onsolidation Act, 1845 (8 & 9 Vict. c. 16), was to simplify ıe evidence in actions against incorporated Companies, ıd they cannot take advantage of their own negligence omitting to make the required entry in their books. here is no illegality on the face of the bond, and the aintiff had no knowledge of an excess of authority: *The oyal British Bank* v. *Turquand* (*a*). The maxim "omnia esumuntur rite esse acta" applies. The seal having been ixed by a person who had the legal custody of it, it was cumbent on the defendants to give strict proof that the quisite formalities had not been complied with; *Clarke The Imperial Gas Light Company* (*b*), *Hill* v. *The Man- ester and Salford Waterworks Company* (*c*). Moreover, uming that there was irregularity in the making of the nd, the registration of its transfer to Hall was an admis- ›n by the Company of its validity: *Laird* v. *The Birken- ad Railway Company* (*d*), *Lowe* v. *The London and North estern Railway Company* (*e*).—They also referred to the ırd, 95th and 97th sections of the Companies Clauses onsolidation Act, 1845, and the 24th section of the & 28 Vict. c. ccxciv.

(*a*) 5 E. & B. 248.
(*b*) 4 B. & Adol. 315.
(*c*) 5 B. & Adol. 866. 874.
(*d*) Johnson, 500.
(*e*) 18 Q. B. 632.

1866.

D'Arcy v. Tamar, &c., Railway Co.

Montagu Chambers (with whom was *Paterson*), in support of the rule.—It was proved that this bond was not the deed of the Company. No doubt, when the bond was produced with the seal of the Company affixed to it, the presumption was that it was regularly affixed; but that presumption was rebutted by evidence that the secretary was not duly authorised to seal the bond. The shareholders of an incorporated Company are not bound by the acts of their directors unless done at a properly constituted meeting of the board. Directors have no power individually to authorize the secretary to make contracts.—(He was then stopped by the Court.)

Martin, B.—I am of opinion that it was proved that the bond declared on is not the deed of the defendants.

The Company was constituted by the 27 & 28 Vict. c. ccxciv., and consists of a corporation of shareholders. It is essential that the business of such a Company should be conducted by directors; and the acts of the directors, when lawfully done as such, bind the Company. The 24th section of that Act, which incorporates the Companies Clauses Consolidation Act, 1845, enacts that "the number of directors until the first general meeting of the Company shall be eleven, and afterwards the number shall not exceed six; but the Company may from time to time reduce or increase the number of directors within the limits of three as the minimum, and six as the maximum; and the quorum of a meeting of directors shall be three, unless the number of directors is reduced to three, and then until the number is raised the quorum shall be two." In this case it was proved that there were four directors; and when the 24th section says that the business of the Company may be conducted by a "quorum" of directors,

means, what common sense points out, that the directors constituting the quorum shall act together, and that their minds shall co-operate.

The 97th section of the Companies Clauses Consolidation Act provides for the mode in which contracts may be made. No particular place or time is required; but the power granted to any committee of directors to make contracts, as well as the power of the directors to make contracts, on behalf of the Company, may lawfully be exercised as follows:—"With respect to any contract which, if made between private persons, would be by law required to be in writing and under seal, such committee, or the directors, may make such contract on behalf of the Company in writing, and under the common seal of the Company." This was a contract *by bond*, and if made between private persons, would be by law required to be in writing and under seal; but it might be made either by a committee or the directors. Here there was no committee, and therefore the bond, to be valid, must be made by the directors. Then was it made by them? In my opinion it was not. It was made by the secretary placing the seal of the Company upon it, and is not binding on them unless the directors authorized him to seal it. But the directors, in order to give authority to make a bond which shall bind the shareholders, must act together, and with one mind. This is not a bond of that character, and therefore not the deed of the Company; and the rule must be absolute to enter a nonsuit.

BRAMWELL, B.—I am of the same opinion. This bond was an instrument not "ultra vires;" and therefore, when produced with the common seal of the Company affixed to it, primâ facie it must be presumed that the seal was properly affixed. The answer to that presumption is that the

1866.
D'Arcy v. Tamar, &c., Railway Co.

seal was not properly affixed, because it was not affixed by such a quorum of directors as could bind the Company. Three directors are sufficient for a quorum; but it is necessary that they should act conjointly and as a board. I do not say that any particular time or place is necessary, but they must meet and act together; otherwise this consequence would follow, that while the actual board was sitting at one place a number of directors sufficient to form a quorum, though each was at a different place, might do exactly the opposite to the board. Therefore, in this case it is manifest that the seal of the Company was affixed by the secretary without authority; for it was not affixed with the assent of three directors meeting and acting as a board. It is absolutely necessary to allow an investigation of the matter, otherwise the affixing the seal of the secretary without a shadow of authority would bind the shareholders.

Channell, B.—I am also of opinion that the rule ought to be absolute to enter a nonsuit. The production of the bond with the seal of the Company affixed to it was primâ facie evidence that it was the deed of the Company, for it must be presumed that the seal was properly affixed. But then it was competent to the defendants to shew that some formality necessary to give validity to the bond had not been complied with; and there is no doubt that objection may be raised by the plea of non est factum. Mr. *Chambers* accepted the onus of proof, and contends that he has satisfied it. I think he has. It appeared that there were at least four directors, and the secretary endeavoured to obtain the authority of three to seal this bond. On one occasion he obtained the authority of two directors, and afterwards the authority of another. Without saying that directors must meet at any particular place, or that they may not adjourn, I am of opinion that they must meet in

1866.

D'ARCY v. TAMAR, &c., RAILWAY CO.

a directorial character, so that everyone present may have an opportunity of expressing his assent or dissent. Here the authority was conferred by two directors only acting together, and who were not sufficient to constitute a board.

PIGOTT, B.—I am of the same opinion. No doubt the onus was on the Company to prove that this bond was not their deed. By the special Act of the Company three directors are sufficient for a quorum; but in order to act as a quorum it is necessary that they should meet together as directors. So far from that the evidence is express that there was no meeting of three directors, but the secretary at first obtained the assent of two directors, and afterwards got a third to assent.

Rule absolute.

LEE v. WILMOT.

June 11.

A debtor wrote to his creditor as follows:—"It is true I have not sent you any money for years, but I really have none of my own. We just manage to exist on my wife's. We have hard work to get on, but I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week."—*Held*, a sufficient acknowledgment within the 9 Geo. 4, c. 14, s. 1, to take the case out of the Statute of Limitations: Per *Bramwell*, B., and *Channell*, B.—Dissentiente, *Martin*, B.

ACTION on a promissory note.

Plea.—That the cause of action did not accrue within six years before suit.—Issue thereon.

At the trial, before *Pigott*, B., at the Middlesex Sittings in the present Term, it appeared that the action was commenced in April, 1866, and more than six years after the note became due. The plaintiff, in order to take the case out of the Statute of Limitations, gave in evidence the following letter written to him by the defendant:—

1866.
LEE
v.
WILMOT.

"Bramston,
"Oakham,
"Dear Sir, "13th August, 1863.

"Your letter has reached me at last after having been half over England. It is quite true that I have not sent you any money for years, but I really have none of my own. We just manage to exist on my wife's,—at least on what is left of hers. We have hard work to get on but I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week.

"And I remain, yours truly,
"Mr. Lee." "F. S. Wilmot."

It was submitted on behalf of the defendant that this letter was not a sufficient acknowledgment in writing within the 9 Geo. 4, c. 14, s. 1, to take the case out of the Statute of Limitations, 21 Jac. 1, c. 16, s. 3.

The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

Crompton having obtained a rule nisi accordingly,

Wills shewed cause.—The defendant's letter is a sufficient acknowledgment of the debt within the 9 Geo. 4, c. 14, s. 1. The general principles deduced from the authorities are, first, that there must be either an *express promise* to pay, or an acknowledgment or admission of the debt, in terms so distinct and unqualified as that a *promise* to pay *on request* may be reasonably *inferred:* Chitty on Contracts, p. 735, 7th ed. There are cases near the dividing line, for instance, where there is an absolute admission of the debt, accompanied with a request for indulgence: *Cornforth* v. *Smithard* (*a*); or coupled with

(*a*) 5 H. & N. 13.

some stipulation or condition, which has been performed. [*Bramwell*, B.—The difficulty has arisen from not regarding the plain words of the statute, which says that "no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, &c., unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable," &c. If a debtor writes to his creditor "I owe you the money," how is that the less an acknowledgment of the debt, because he couples it with a request for indulgence? Here the defendant says "I am anxious to get out of your debt;" and if that had stood alone it would clearly have been an unconditional acknowledgment. *Martin*, B.—At one time it was considered that the Statute of Limitations was founded on the presumption of payment, and that any acknowledgment which repelled that presumption was in legal effect a promise to pay the debt; though such acknowledgment was accompanied with only a conditional promise, or even a refusal to pay. But before the 9 Geo. 4, c. 14, it had been decided that an acknowledgment operates only as *evidence* of a promise to pay; and accordingly, that upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but that where the party guards his acknowledgment an implication will not arise: Wms. Saund., vol. 2, p. 64 *h*, note (*c*). Such being the law, the question is whether a promise to pay can be implied from the terms of this letter.] In *Cornforth* v. *Smithard* (*a*) *Pollock*, C. B., points out the difference between the construction to be put on a letter written a short time after the debt has been contracted, and one written after the debt is already barred. In the latter case the debtor is in a situation to impose a condition; but in

(*a*) 5 H. & N. 13. 14.

1866.
LEE
v.
WILMOT.

the former, as the debtor has no right to time, the qual cation of the promise must be construed, not as a conditio but an excuse for not sending the money. There may l a sufficient acknowledgment of a debt, although the amou is not ascertained: *Sidwell* v. *Mason* (*a*). In *Rackham* *Marriott* (*b*) there was the mere expression of a hope t make some satisfactory arrangement, not an acknowled ment coupled with a promise to pay. [*Bramwell*, B., r ferred to *Smith* v. *Thorne* (*c*).] In that case there was r absolute acknowledgment of the debt or unqualified pr mise to pay it, but the mere expression of a hope. He there is an absolute acknowledgment of an existing del coupled with expressions which merely amount to a appeal for forbearance.

Crompton, in support of the rule.—The sole object the 9 Geo. 4, c. 14, was to prevent a *parol* acknowledgme of a debt from operating to defeat the Statute of Limitatio Even before that Act an acknowledgment did not revi the original debt, but was only evidence of a new promi to pay it: *Hurst* v. *Parker* (*d*). The acknowledgme must now be in writing, but it must still be unconditio so as to support a promise to pay on request, or if coupl with a condition, that must have been fulfilled. There no substantial difference between this case and *Tanner* *Smart* (*e*), where the words were: "I cannot pay the de at present, but I will pay it as soon as I can." [*Bramw* B.—Suppose a debtor said to his creditor, "I am sorry continue in your debt, but I have not got a shilling, a do not see any expectation of getting one for six month P.S.—Pray understand me as promising to pay you, but

(*a*) 2 H. & N. 306.
(*b*) 2 H. & N. 196.
(*c*) 18 Q. B. 134.
(*d*) 1 B. & Ald. 92.
(*e*) 6 B. & C. 603.

cannot pay now."] Here the acknowledgment is qualified by the expression of an intention to *endeavour* to pay at some future period. In *Rackham* v. *Marriott* (*a*) there was an acknowledgment of the debt, but that is not enough. The acknowledgment must be one from which a promise to pay may reasonably be implied. It is not sufficient if made with an entirely different object: *Cockrill* v. *Sparkes* (*b*). Or if there is a mere expression of a hope or an intention to pay: *Smith* v. *Thorne* (*c*), *Fearn* v. *Lewis* (*d*). The true principle is thus stated by Sir *J. Wigram*, V. C., in *Phillips* v. *Phillips* (*e*):—"If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the whole debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund the creditor can claim nothing more than the promise gives him." That principle was recognised in *Buckmaster* v. *Russell* (*f*). In *Collis* v. *Stack* (*g*) there was an absolute promise to pay, with a request for time. [*Martin*, B., referred to *Hart* v. *Prendergast* (*h*).] Moreover, the letter is a proposal as to the mode of payment, which is not binding unless assented to.—He also referred to *Cawley* v. *Furnell* (*i*).

CHANNELL, B.—I am of opinion that there is evidence to take the case out of the Statute of Limitations, and that the rule ought to be discharged. There is some difference of opinion amongst the members of the Court as to the true construction of the letter in question, which has arisen

(*a*) 2 H. & N. 196.
(*b*) 1 H. & C. 699.
(*c*) 18 Q. B. 134.
(*d*) 6 Bing. 349.
(*e*) 3 Hare, 281. 300.
(*f*) 10 C. B. N. S. 745.
(*g*) 1 H. & N. 605.
(*h*) 14 M. & W. 741.
(*i*) 12 C. B. 291.

1866.
LEE
v.
WILMOT.

from the want of explicitness in the language used; l there is no difference of opinion with respect to the pr ciples of law which govern these cases. There must either an express promise in writing or an acknowledgm of such a nature that a promise may be reasonably infer from it. Though the statute uses the words "acknowle ment or promise," I doubt whether it means two differ things. If the acknowledgment contains an express p mise that is sufficient. If the acknowledgment is qualified it need not contain a promise in express ter but a promise may be inferred from it. But if the ackn ledgment, however distinct and explicit, is coupled witl refusal to pay, a promise cannot be inferred. So, if acknowledgment be one from which a conditional prom only can be inferred, it will not satisfy the statute until condition has been fulfilled. In my opinion this le does contain an acknowledgment from which a promise pay may be inferred, and that inference is not exclu by any refusal to pay, or statement making the prom conditional.

BRAMWELL, B.—I am of the same opinion, and for same reasons. Mr. *Crompton* in effect admits that letter contains expressions which, if they had stood alo would have been sufficient to take the case out of statute, for there would then have been an unqualif acknowledgment of the debt. But he contends that cause the debtor, in addition to acknowledging the debt, expressed his intention to endeavour to pay some part it the next week, the acknowledgment is not one fr which a promise to pay can be implied. It would unfortunate if such an argument were to prevail. It see to me better to decide the case on the ground on whi my brother *Channell* has based his judgment, that t letter contains an acknowledgment from which a promi

to pay may be inferred, and that is not qualified by a refusal to pay, or any statement which makes the payment conditional.

MARTIN, B.—In my opinion this letter is not a sufficient acknowledgment or promise to take the case out of the Statute of Limitations. The law is correctly laid down in 2 Wms. Saund. 64 *h* and 64 *i*, note (*c*), and it is said that "since Lord Tenterden's Act it has been fully settled that in order to take the case out of the Statute of Limitations, the document must either contain a promise to pay the debt, or an acknowledgment in writing from which such promise can be inferred."

In my opinion the proper mode of deciding questions of this kind is, not by looking at other documents, but by taking the document before us, and giving it a fair and candid consideration, to ascertain whether it contains a promise to pay the debt, or an acknowledgment from which a promise can be implied. I cannot see in this letter any such promise or acknowledgment. If it had stopped with the words "We have hard work to get on," it is impossible to say that there would have been any promise or acknowledgment. It goes on: "but I will try to pay you a little at a time if you will let me." That means "if you will not sue me I will do my best to pay you what I can." It goes on: "I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week." In my judgment the fair and reasonable construction of that is: "I cannot pay you; I have not got any money; but I will do my best endeavours to pay you when I am able." That seems to me to exclude all implication of the absolute promise sued upon.

Rule discharged.

1866.

In the Matter of the Succession of EARL COWLEY to Real Estate under the Will of the EARL OF MORNINGTON, deceased.

A testator devised his real estate to trustees, upon trust to pay out of the rents and profits certain annuities and the interest on mortgage debts, and subject thereto upon trust for C. for life with remainders over. The entire management of the estate was vested in the trustees, and they were authorized to appoint agents, receivers, surveyors, bailiffs and others, and out of the rents and profits to pay the persons so employed such reasonable salaries, wages or other allowances as the trustees might think fit. *Held*, that, in estimating the succession duty, the cestui que trust was not entitled to any deduction in respect of the sums paid to the persons so employed.

THIS was a petition against an assessment made by the Commissioners of Inland Revenue under the Succession Duty Act, 1853, 16 & 17 Vict. c. 51.

The petition (so far as material) stated that by his will, dated the 27th June, 1863, the Earl of Mornington, after bequeathing certain legacies and annuities, and, among others, an annuity to L. Bruchet of 4000*l.* directed to be paid out of the income of his general residuary estate, and after disposing of his personal estate in the manner therein mentioned, devised all his manors, hereditaments, and real estate to William Bulkeley Glasse and Andrew Alfred Collyer-Bristow, their heirs and assigns, upon the following trusts:—

"Upon trust from time to time, out of the rents and profits of the hereditaments, to pay the annual interest of the principal sums which at the time of my decease shall be charged by way of mortgage upon the said hereditaments, or any part or parts thereof: and then upon trust from time to time, out of the annual rents and profits of the said hereditaments, to keep my said mansion house at Draycot, and the offices, outbuildings, orchards, gardens, lawns, pleasure grounds, park, lands, woods and plantations thereto belonging in good, substantial and tenantable repair, order and condition in all respects; and the said mansion house, offices and buildings insured against loss or damage

by fire, in such sum as my said trustees or trustee shall deem reasonable; and from time to time, by and out of the annual rents and profits of the said hereditaments, to keep such other of the messuages, farm and other dwelling houses and buildings for the time being standing upon the hereditaments hereinbefore devised, which the lessees or occupiers thereof respectively shall not be obliged to keep in good and substantial repair, and insured against damage by fire, in good and substantial repair, order and condition, and insured against damage by fire in such sums of money as my said trustees or trustee shall deem reasonable: and then upon further trust from time to time, whilst the said annuities hereinbefore bequeathed, or any of them, shall continue payable, by and out of the annual rents and profits of the said hereditaments, to pay such parts of such of the said annuities for the time being payable as the annual income of my general residuary personal estate shall be insufficient to pay and satisfy: and subject and charged, as hereinbefore is mentioned, upon trust for Henry Richard Charles Earl Cowley, and his assigns during his life, and after the decease of the said Earl Cowley, upon trust for William Henry Viscount Dangan (eldest son of the said Earl Cowley), and his assigns during his life; and from and after the decease of the said Viscount Dangan, upon trust for the first and every other son of the said Viscount Dangan successively in tail male," with divers remainders over.

And by and in the said will it was provided as follows:—

Provided always, and I hereby authorise my trustees or trustee for the time being, during such time as my said manors, messuages, lands, tenements, and hereditaments, or such of them as for the time being shall be unsold, shall remain subject to the payment of any mortgage debt charged thereon at the time of my decease, and

1866.

IN RE EARL COWLEY.

during such time as the said annuities hereinbefore bequeathed, or any of them, shall continue payable, to permit and authorize any person who, but for the charges and provisions as to management created and contained by and in this my will, would under and by virtue of this my will be for the time being entitled to the possession of my said freehold manors, messuages, lands, tenements and hereditaments, personally to occupy my said mansion house at Draycot, and the offices, outbuildings, orchards, gardens, lawns, pleasure grounds, park lands, woods and plantations thereto belonging. And I expressly direct that during such time as my said manors, messuages, lands, tenements and hereditaments, or such of them as for the time being shall be unsold, shall remain subject to the payment of any mortgage debt charged thereon at the time of my decease, and during such time as the said annuity of 4000*l.* to the said L. Bruchet shall continue payable, the said William Bulkeley Glasse and Andrew Alfred Collyer-Bristow, and the survivor of them, and the heirs of such survivor, their or his assigns, shall continue in the possession or receipt of the rents and profits of the said hereditaments and premises (but without prejudice always to the trust last aforesaid as to the occupation of the said mansion house and premises as last aforesaid), and manage and superintend the management of the same premises, and may cut timber and underwood from time to time in the usual course, for sale or repairs, or otherwise, and may erect, pull down and repair houses and other buildings and erections, and drain or otherwise improve all or any of the said premises, and insure houses, buildings and other property against loss or damage by fire, and make allowances to and arrangements with tenants and others, and accept surrenders of leases and tenancies, and generally may deal with the premises as if they or he were the absolute owners or owner thereof, without being answerable for any loss or damage which may happen

thereby. And I authorize the said William Bulkeley Glasse and Andrew Alfred Collyer-Bristow, and the survivor of them, and the heirs of such survivor, their or his assigns, during such times as last aforesaid, to appoint stewards or a steward of any manors or manor for the time being subject to the trusts aforesaid, and to appoint agents, receivers, surveyors, bailiffs, and others for the general letting and management of the manors, messuages, lands, tenements and hereditaments for the time being subject to the trusts of this my will, and the collecting the rents and profits thereof, and out of the rents and profits of the said premises to pay or allow to the person or persons so employed such reasonable salaries, wages, or other allowances as the said William Bulkeley Glasse and Andrew Alfred Collyer-Bristow, or the survivor of them, or the heirs of such survivor of them, or their or his assigns, may think fit.

The testator died on the 25th July 1863, without having revoked or altered his said will, except by a codicil, wherein and whereby the testator charged his real estate devised by his said will with the payment of his debts, funeral and testamentary expenses, and the pecuniary legacies given by his said will, and bequeathed certain annuities, and desired that the trustees or trustee for the time being of his said will should, by and out of the annual rents and profits of the real estate devised by his said will, pay the annuities in the said codicil bequeathed in such and the same manner as if the said annuities had been bequeathed by his said will.

At the time of the death of the said testator his real estate remained and was subject to the payment of mortgage debts to the amount of 336,000*l.*

The trustees named in the will have accepted and are in the exercise of the trusts therein created; the said

1866.

IN RE EARL COWLEY.

mortgages are still subsisting; the said L. Bruchet is still alive; and the trusts remain in full force and undetermined.

Since the death of the testator the trustees have necessarily employed resident agents and superintendents of repairs upon the said estates, and have paid them respectively out of the rents thereof certain annual salaries, the same being reasonable remuneration for the services rendered by them.

They have also necessarily employed receivers to receive the rents of the estates, and have allowed them a percentage of 4*l.* on the gross annual receipts, the same being a reasonable remuneration for the services rendered by such receivers.

Your petitioner made returns to the Commissioners of Inland Revenue of all the succession on real property accruing to him upon such death as aforesaid, and in such return claimed to have an allowance made to him under the provisions of the Succession Duty Act, 1853, in respect of certain necessary outgoings, and amongst them the salaries for and in respect of the said resident agents and superintendents of repairs of the estates, and also in respect of the receivers' percentage on the gross amount of rents received and other annual receipts at the rate of four pounds per cent.

The said Commissioners have in the assessment made by them in respect of such succession refused to make such allowance for salaries and receivers' percentage as aforesaid.

The sum in dispute in respect of duty on such assessments amounts to a large sum, that is to say, to the sum of 1116*l.* 8*s.* 9*d.*

Your petitioner, by his solicitors, delivered to the said Commissioners, within twenty-one days after the date of

the said assessment, notice in writing of his intention to appeal against such assessment, and within the further period of thirty days delivered a statement of the grounds of such appeal as follows:—

1. That the Commissioners, having regard to the trusts and provisions of the said will, ought to have allowed the claim so made by the said Earl Cowley as aforesaid.

2. That during the continuance of the trusts, charges and provisions created by the said will, the trustees are entitled to receive all the rents and to manage the repairs, and otherwise to deal with the estates as if the said trustees were the absolute owners thereof.

3. That the trustees are authorized by the said will to appoint agents, receivers, surveyors and bailiffs, and others, for the general letting and management of the estates, and part of the rents and profits to pay or allow to persons so employed such reasonable salaries, wages, or other allowances as the said trustees shall think fit.

4. That for the proper management and superintendence of the estates, and of the repairs thereof, and the receipt of the rents thereof, it is reasonably necessary to expend the annual sum of 1862*l.* 10*s.*

5. That the trusts created by the said will remain in force and undetermined, and that the trustees have accepted and continue in the exercise of the trusts.

6. That during the continuance of the said trusts the said Earl Cowley is absolutely precluded from acting as receiver of the rents and from superintending the repairs, and from interfering in any way with the management of the estates.

Prayer.—That the assessment of the said Commissioners may be altered or varied so far as the same omits to make to your petitioner an allowance under the provisions of the said Act for or in respect of the necessary outgoings, that

1866.
IN RE EARL COWLEY.

is to say, in respect of the salaries of resident agents, and of the superintendents of repairs, and of a receiver's per centage, as hereinbefore mentioned, as provided by the 22nd section of the Succession Duty Act, 1853.

Bovill and *Hannen* for the petitioner.—The petitioner is entitled to the allowances claimed. The question is, whether the duty is to be imposed solely on the beneficial interest of the successor, or also on all the charges on the property out of which that beneficial interest is derived. Here the instrument which creates the beneficial interest creates a variety of charges, and in considering what is the beneficial interest which ultimately accrues to the successor, it can make no difference what the character of those charges may be. This case is distinguishable from *In re Elwes* (*a*), where it was held that if a successor to real estate employs an agent to collect his rents, he is not entitled to a deduction in respect of the agents' charges. Here, the property is vested in trustees, who are to receive the rents and apply them in payment of certain specified charges; and subject thereto to hold the property in trust for the petitioner. The trustees are authorized to appoint agents, receivers, surveyors, bailiffs and others, and out of the rents to pay them such salaries as the trustees may think fit. The trustees are obliged to expend large sums in payment of interest on mortgages. The assessment is made on the value of the whole estate, without any allowance for sums which never can be received by the petitioner. He has no beneficial interest, except in so much of the property as remains after satisfying the expenses which the trustees must incur. It might happen that he would have nothing whatever to receive. The 16 & 17 Vict. c. 51 is an Act for granting duties "on succession to property;" but

(*a*) 3 H. & N. 719.

e petitioner has never succeeded to the property now arged with duty. Sect. 2 declares what shall be a succes-on, viz., every disposition of property "by reason whereof y person has or shall become *beneficially entitled* to any pro-rty," &c. The 20th section defines when the duty is to be id, viz., when the successor becomes entitled in possession. y the 21st section, the interest of every successor is to be nsidered of the value of an annuity *equal to the annual value such property* after making such allowances as are therein-ter directed. That means the annual value to the owner. lere the annual value is diminished by the sums expended y the trustees. The 22nd section provides that in esti-ating the annual value of lands, &c., "an allowance all be made of all *necessary outgoings*." Here the peti-ioner is not entitled to the lands. The principle of the ecision in the case of *In re Elwes* (*a*) was, that if the wner of property thinks fit to employ an agent to collect is rents, he is not entitled to a deduction in respect of he agent's charges, "as a necessary outgoing." But here he petitioner has no power to receive the rents, nor any ontrol over the expenditure of the trustees.

The Attorney General (with whom were *The Solicitor General* and *C. Hutton*), for the Crown.—The question is, whether payments which are not, under the 22nd section, "necessary outgoings," can be made so by the separation of the legal and equitable estates, and the directions of the creator of the trust. Suppose, instead of the interposition of trustees, there had been a direct gift of the property to the petitioner subject to these charges, could it be contended that he would be entitled to an allowance in respect of them? The powers conferred on the trustees are so large, hat if the argument for the petitioner were to prevail, he

(*a*) 3 H. & N. 719.

persons in whom the management of the property is vested are accountable for the duty as well as the successor; and by the 45th section the persons accountable must deliver a true account of the property. The effect of these clauses is to unite, for the purpose of the assessment, the legal and equitable interest, and they render either the trustee or cestui que trust chargeable.—They referred to *Pugh* v. *Vaughan* (*a*).

Bovill replied.

POLLOCK, C. B.—We are all of opinion that the petition ought to be dismissed.

The case of *In re Elwes* (*b*) is a direct authority, assuming that there is no distinction between cases where an allowance is claimed in respect of expences incurred *individually* by the successor, and those incurred by trustees acting on his behalf. Mr. *Bovill* says that they are not trustees for him only. Properly speaking they are trustees for the whole estate, but as regards the present question they are trustees for the successor. There may be a distinction in point of fact, and it may be so speciously stated as for a moment to create a doubt, but as soon as the entire question is looked at, with all the elements which should be considered in order to determine it, the distinction altogether vanishes. It might be said that if a person is under the necessity of incurring certain expenses before he can obtain the property bequeathed to him, he ought to be allowed a deduction in respect of those expenses. As a simple proposition, that would seem not unreasonable; but immediately an examination is made as to the object of the tax, and the manner in which the act of parliament is to be administered, the matter assumes a different shape.

(*a*) 12 Beav. 517. (*b*) 3 H. & N. 719.

1866.

IN RE EARL COWLEY.

If a person has nothing left him but a house let at a rent of 100*l.* a year, which he can collect in the next street, he would pay succession duty upon the annual value of 100*l.* a year. If estates are left to him in different counties, so that instead of being able to collect the rent in the next street he is obliged to travel several hundred miles, or employ agents, he is not entitled to any deduction from the annual value of the property on account of his travelling expenses, or the salary of an agent. It seems to me a clear deduction from the several clauses of the Act that the duty depends on the actual value of the property, not on the expenses which the successor may incur in collecting its revenues. If the property is so large that the successor cannot possibly collect the rents himself, so much the better for him; but that is no reason why the Crown should get less than if it was divided amongst one or two hundred people. According to the argument of Mr. *Bovill*, the more wealthy a man becomes by a bequest the more the Crown must lose in consequence of his inability to deal with so large a property. Therefore it seems to me that the expenses in respect of which a deduction is now claimed ought not to be allowed.

Then, looking at the facts of the case, it is true that the trustees are empowered to make certain allowances, which they may pay at their will and pleasure, but it is found as a fact that they pay no more than is necessary. It may therefore be assumed that they pay no more than Lord Cowley would have paid if the property had been directly left to him subject to those charges. Then why should the fact that the trustees pay them create any difference? There is a difference in name, but not in fact.

For these reasons I think that the petition ought to be dismissed.

MARTIN, B.—I am of the same opinion. There are two questions, one substantial the other formal. The substantial question is whether, when property, encumbered with charges, devolves upon a successor, in estimating the value of the succession the expense of collecting the rents and managing the estate are to be deducted. It seems to me that the case of *In re Elwes* has decided that question, and that it is an authority for our judgment.

But if we look at the 44th section of the Succession Duty Act, I think all doubt is removed. That section enacts that "the following persons, besides the successor, shall be personally accountable to her Majesty for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them respectively." The section then proceeds to enumerate the persons:—"Every trustee, guardian, &c., in whom respectively any property, or *the management of any property* subject to such duty, shall be vested." I apprehend, therefore, that if the trustees had been called upon to make a return instead of Lord Cowley, they would not have been entitled to deduct the sums in respect of which an allowance is now claimed.

I also think that the 21st section coupled with the 34th leads to the same conclusion. By the 21st section, the interest of the successor to real property is to be considered of "the value of an annuity equal to the annual value of such property after making such allowances as are hereinafter mentioned." The 22nd section relates to allowances different from those now claimed. The 34th section points out what allowances are to be made in estimating the value of a succession, and it provides that upon a successor becoming entitled to real property subject to any charge, such as a mortgage, annuity, &c., "an allowance shall be made to him in respect *only* of the yearly sums payable

1866.

IN RE EARL COWLEY.

by way of interest, or otherwise, on such charge." Therefore it seems to me that there is an express enactment, that in estimating the value of the property in respect of which the duty is to be paid deductions ought not to be allowed in respect of the expenses of agents, receivers, surveyors, bailiffs and others employed in the management of the property. I cannot think that the mode of estimating succession duty is to depend on the skill with which the conveyance is prepared; but that, as laid down in the House of Lords (*a*), we must look at the intention of the legislature as expressed by the words of the Act.

Then with respect to the argument of Mr. *Bovill* as to the hardship of Lord Cowley being called upon to pay this duty, he takes the property as it is bequeathed to him. He was under no obligation to take it; and no doubt he has voluntarily come forward to be assessed, so that he cannot complain that the assessment has been made on him and not on the trustees.

BRAMWELL, B.—I am of the same opinion. After giving the case that careful consideration which Mr. *Bovill* contends we are bound to give it, I have come to a conclusion adverse to him. The question turns on the 21st section, which says "that the interest of every successor," &c., "in real property shall be considered to be of the value of an annuity equal to the annual value of such property." If the section had stopped there it is clear that the interest of Lord Cowley would have been of the value of the property without the deductions now claimed. But the section proceeds to say, "after making such allowances as are hereinafter directed." The section referred to is section 22, and I am strongly inclined to think (though it is not necessary to say so) that section 22

(*a*) *Lord Saltoun* v. *The Advocate General*, 3 Macqueen, 671.

has no operation, and that if it had been omitted the allowances for which it provides would have been made; for it is absurd to suppose that the true annual value of houses or land can be ascertained without estimating the cost of repairs, tithes and other charges upon them. But whether the 22nd section was required or not, it directs an allowance to be made of "all necessary outgoings." Then what is the meaning of the expression "necessary outgoings"? Mr. *Bovill* argues that it means all outgoings which the owner cannot help. I do not think that is its true meaning. In my opinion it means, not all such outgoings as the predecessor may have thought fit to impose, and which therefore in one sense are necessary, but all such as are intrinsically necessary, and which it was not in the option of the predecessor to impose or not, as he pleased. That seems to me the true meaning of "necessary outgoings," and that meaning is in conformity with the reasoning of my late brother *Watson* in the judgment in *In re Elwes*. Therefore to my mind the allowances now claimed are not in respect of "necessary outgoings;" and it seems to me that on that short consideration this case ought to be decided in favour of the Crown.

But Mr. *Bovill* has ingeniously argued that the charge must be on Lord Cowley's *beneficial interest*. Now the words "beneficial interest" are not found in section 21 or section 22. The words in section 21 are "*annual value* of such property," to ascertain which there must be an abatement of necessary outgoings. Therefore it seems to me manifest that the case ought to be decided in favour of the Crown.

It is argued that this is a hard case, because if the property, instead of being left to trustees, had been left to Lord Cowley it would have been in his option to deter-

1866.
IN RE EARL COWLEY.

mine whether he would employ bailiffs, receivers, &c., and so he might have acquired a greater benefit from it. Possibly it may appear to some extent a hardship, but in reality it is not, because, considering who are the trustees, it is certain they will not expend more than Lord Cowley would have felt himself bound to do. If this argument were of any avail it would be competent for every testator to say:—"I am going to leave a large estate; I know my devisee cannot manage it himself, and in order that he may get the benefit of allowances out of succession duty, I will leave the estate to trustees to manage for him." So that, by the mere contrivance of words, a devisee would be subject to less succession duty than he ought to pay. However, it is not necessary to advert to that except as an answer to the argument. My judgment proceeds upon the authority of *In re Elwes*, and upon the consideration that the tax is to be assessed on the annual value of the property, after making deductions for necessary "outgoings," which mean outgoings intrinsically necessary, not expenses of management which the testator may have thought necessary.

CHANNELL, B.—I am also of opinion that the petition ought to be dismissed. I consider that the petition only raises a question as to the *quantum* of assessment, that is, whether, according to the prayer of the petition, Lord Cowley is entitled, under the 22nd section of the Succession Duty Act, to the allowance which he claims. It seems to me immaterial to consider, at least at any length, the question on whom the duty may be assessed. I think that, under the 44th section, it may be assessed either on the person who succeeds to the property or the person who has the management of it. Therefore I think that, in

point of form, the duty was properly assessed. Whether it is assessed on the trustees or on the person having the beneficial interest, we have to consider the question of *quantum*, and in my opinion that depends on the construction of the 21st and 22nd sections. By the 21st section the assessment is to be made according to "the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed." And by the 22nd section, in estimating the annual value of lands an allowance is to be made of all necessary outgoings. There are one or two other sections which provide for deductions not included in the 22nd section; but we have to determine in the first place what is the annual value of the property, and then to deduct from that certain outgoings which are specially provided for by the Act. It appears to me that the 22nd section does not provide for the deductions now claimed. If, therefore, there was no authority in point I should come to the same conclusion; but I conceive that, although there is a difference in point of fact between this case and that of *In re Elwes*, the principle of that decision warrants the judgment which we now pronounce.

Petition dismissed.

1866.

June 12.

HODGSON *v.* SIDNEY.

To a declaration alleging that the plaintiff was induced, by the false and fraudulent representations of the defendant, to make large payments on account of a certain manufacture, and "by reason of the said false and fraudulent representation the plaintiff sustained great loss and was adjudicated bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit," the defendant pleaded, except as to the claim in respect of the plaintiff being adjudicated bankrupt and the personal annoyance, trouble, inconvenience and injury to his character and credit, that the loss was a pecuniary loss, and that the cause of action pleaded to vested in the plaintiff's official assignee.—*Held*, a good plea, inasmuch as the only damage recoverable was in respect of the pecuniary loss.

DECLARATION.—For that the plaintiff, having been requested by one J. C. Piper to advance, lay out and expend a large sum of money, to wit, 2000*l.*, for the purpose of producing and to be employed in the manufacture of certain wine, which said wine, as the plaintiff was informed by the said J. C. Piper, had been ordered by one William Sidney for exportation to Australia and California under conditions of certain cash payments to be made therefore by the said William Sidney to the extent of 2000*l.*, applied to the defendant to inform him the plaintiff whether the said William Sidney might be depended upon for cash payments to the said extent and whether the said order had been so given as aforesaid. That thereupon the defendant, well knowing the aforesaid premises, and intending that the plaintiff should act upon the representation made by him as hereinafter mentioned, falsely and fraudulently represented to the plaintiff that the said William Sidney was able to carry out the arrangement for purchasing the said wine, which, as the defendant represented, he, the said William Sidney, had entered into with the said J. C. Piper, to wit, the said order: whereas in truth and in fact the said William Sidney was not able to carry out the said arrangement or order, or to pay for the said wine. And that the defendant, by so representing as aforesaid, induced the plaintiff to make certain large advances and payments of money on account of the said manufacture,

n respect of the said arrangement or order, whereby
y reason of the said false and fraudulent representa-
he plaintiff has sustained great loss, and became and
djudicated a bankrupt, and suffered great personal
ance, and was put to great trouble and inconve-
e, and was greatly injured in character and credit.
a.—The defendant, except as to the claim in respect
plaintiff becoming and being adjudicated a bankrupt,
uffering the alleged personal annoyance, and being
o the alleged trouble and inconvenience, and being
ed in character and credit, says that the said loss
the plaintiff sustained as in the declaration alleged
pecuniary loss, to wit, the loss of the monies which
advanced and paid as in the declaration mentioned,
he defendant says that after the accruing of the sup-
l cause of action, and before this suit, the plaintiff,
liable to become and to be adjudicated a bankrupt
reafter mentioned, became bankrupt, and was, upon
ition for adjudication in bankruptcy duly filed against
by himself in a Court having jurisdiction to receive
ame, and to adjudicate thereon, was by the said Court
adjudicated to be a bankrupt, according to the statutes
ree concerning bankrupts, and thereupon an official
nee of the estate and effects of the plaintiff, as such
rupt, was, according to the said statutes, duly appointed
e this suit. And the defendant says that all things were
and happened, and all times elapsed according to the
statutes, to give validity to the said adjudication and
intment, and to cause the estate of the plaintiff,
ding the cause of action in the declaration mentioned,
herein pleaded to, to vest and the same did vest in
aid official assignee before this suit, and has not re-
ed in the plaintiff.
emurrer, and joinder therein.

1866.
HODGSON v. SIDNEY.

Lumley Smith argued in support of the demurrer (*a*).—The cause of action did not vest in the assignee under th plaintiff's bankruptcy, but remained in the plaintiff. Th is an action of tort, and the alleged damage is of a mixe character, viz., injury to the plaintiff personally, and injur to his estate. [*Bramwell*, B.—Under this declaration th only damage which the plaintiff could recover is th pecuniary loss: the becoming bankrupt is too remote.] I *Howard* v. *Crowther* (*b*), *Alderson*, B., said:—"Assignee can maintain no action for libel, although the injury occa sioned thereby to the man's reputation may have been th sole cause of his bankruptcy." It would seem therefor that bankruptcy might be the subject of damage. *Brewe* v. *Dew* (*c*) was an action of trespass for taking the plain tiff's goods under a false and unfounded claim of a debt per quod the plaintiff was annoyed and prejudiced in his business and believed by his customers to be insolvent, and it was held that the right of action did not pass to the plaintiff's assignees on his bankruptcy. There the tes applied was whether the jury could give vindictive damage beyond the value of the goods. Here, although th pecuniary loss to the plaintiff might be only 2000*l.*, th jury might give damages beyond that amount in respec of the personal injury and annoyance to the plaintiff.

Field, in support of the plea.—The true mode of ascer taining whether the cause of action remains in the bankrup or has passed to his assignees, is to consider whether th injury *primarily* affects the person or the estate of the bank rupt. In the former case the right of action does not pass t the assignee, although it may be attended with a consequentia

(*a*) May 30. Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.

(*b*) 8 M. & W. 601.

(*c*) 11 M. & W. 625.

diminution of the personal estate; but in the latter case the right of action will pass to the assignee, although the bankrupt may have sustained some personal injury: *Beckham* v. *Drake* (*a*). [*Channell*, B., referred to *Wetherell* v. *Julius* (*b*).] Here the estate of the bankrupt has been diminished by the wrongful act of the defendant. [*Martin*, B.—By the exception in the plea, the defendant admits that some cause of action remains in the bankrupt. Can a cause of action be divided, so as to enable the bankrupt to sue for his personal injury and the assignee for the damage to the bankrupt's estate?] In *Brewer* v. *Dew* (*c*) Lord *Abinger* intimated, in the course of the argument, that a plea like this limited to the *value* of the goods might be supported. In *Rogers* v. *Spence* (*d*) the declaration included some causes of action which would not pass to the assignees, and it was held a plea of the plaintiff's bankruptcy, which embraced the whole, was bad.

Lumley Smith, in reply.—There is no authority that part of a cause of action may remain in a bankrupt and the other part vest in his assignees. [*Bramwell*, B.—I can conceive a case in which the cause of action may be divided, for instance where a person contracts to do two things, and the non-performance of one only affects the bankrupt personally while the non-performance of the other is an injury to his estate; but it is difficult to see how special damage can be split.] In *Beckham* v. *Drake* (*e*) *Parke*, B., said:—"Who would have to sue if the contract was to cure the bankrupt of a disease and give him a sum of money, and there had been a breach of both parts? It is extremely difficult to say in whom the right

(*a*) 2 H. L. 579.
(*b*) 10 C. B. 267.
(*c*) 11 M. & W. 625.
(*d*) 12 Cl. & F. 700.
(*e*) 2 H. L. 579, 629.

1866.

HODGSON v. SIDNEY.

of action would be. Either the right of action on the contract must be divided, and each sue, or the right of action altogether must remain in the bankrupt, or altogether be transferred to the assignees, or both must join, the contract being entire, to sue for the damages." The same difficulty was adverted to by Lord *Cottenham* in *Rogers* v. *Spence* (*a*). Here part of the cause of action is the personal annoyance and inconvenience sustained by the bankrupt, and as that would not pass to his assignee all remedy would be lost if the bankrupt cannot sue.

Cur. adv. vult.

MARTIN, B., now said.—This is an action for a false and fraudulent representation, and the declaration alleges that by reason thereof the plaintiff "sustained great loss, and became and was adjudicated a bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit." The plea, except as to the claim in respect of the plaintiff's becoming and being adjudicated a bankrupt and suffering the alleged personal annoyance, and being put to the alleged trouble and inconvenience, and being injured in character and credit," states that the plaintiff had become bankrupt and the cause of action vested in the official assignee. To this plea there is a demurrer.

We are all of opinion that the plea is good, on the ground that the exception contained in it may be altogether rejected as nugatory, and that in point of fact the case is the same as if the plea had been pleaded to the whole declaration. We think that the only damage which can be recovered is pecuniary damage, the right to sue for which passed to the assignee. There must, therefore, be judgment for the defendant.

(*a*) 12 Cl. & F. 700.

BRAMWELL, B.—It seems to me that the personal injury alleged in the declaration, and excepted in the plea, is not the subject of special damage; and that the only damage recoverable is damage of a pecuniary character naturally resulting from the fraudulent representation; and that would pass to the assignee.

But even supposing that there is some personal damage, in respect of which the plaintiff might have recovered if he had not become bankrupt, it seems to me that the cause of action cannot remain in the bankrupt for the purpose of recovering the personal damage, and pass to the assignee for the purpose of recovering the pecuniary damage. Where there is a trespass to a man's person, and also to his goods, I do not see why, in the event of bankruptcy, the assignee might not recover in respect of the latter and the bankrupt in respect of the former. But where there is only one cause of action, it seems to me that, if the right to sue for pecuniary damage passes to the assignee, the cause of action cannot also remain in the bankrupt to enable him to sue for personal damage. For these reasons I think that the plea is good, and that our judgment ought to be for the defendant.

Judgment for the defendant.

1866.

June 12.

GIDDINGS and Another *v.* PENNING.

A trust deed, under the Bankruptcy Act, 1861, contained the following clause:—"It shall be lawful for the said trustees, at the expense of the estate, to require the amount of any debt of any of the creditors to be verified by solemn declaration; and in the event of any such creditors, if in Great Britain or Ireland, failing so to verify such debt for two calendar months after such requisition, such creditor or creditors shall lose all benefit, dividends and advantage to be derived from these presents, and thereupon such last mentioned dividends shall fall into the general estate for the benefit of the creditors not making similar defaults."—*Held* unreasonable, and the deed void: Per *Pollock*, C. B., *Bramwell*, B., and *Channell*, B.—*Martin*, B., dubitante.

DECLARATION for goods sold and delivered.

Plea.—That after the accruing of the plaintiffs' claim, &c., a certain deed was made and entered into by and between the defendant (the debtor) of the first part, two trustees for his creditors of the second part, and the several persons whose names, or the names of whose firms, are written in the schedule thereunder written, and whose seals, or the seals of individual members, or a member or agent of whose firms, are affixed, being respectively creditors of the said debtor upon or against whom these presents shall become valid, effectual and binding by reason of the provisions of the Bankruptcy Act, 1861, as a trust deed for the benefit of creditors, or otherwise howsoever, of the third part.—(The plea then set out in hæc verba the deed, which contained the following clause.)—"Provided also, and it is hereby declared that it shall be lawful for the said trustees, at the expense of the estate, to require the amount of any debt of any of the creditors to be verified by solemn declaration; and in the event of any such creditors, if in Great Britain or Ireland, failing so to verify such debt for two calendar months after such requisition, such creditor or creditors shall lose all benefit, dividends and advantage to be derived from these presents, and thereupon such last mentioned dividends shall fall into the general estate for the benefit of the creditors not making similar defaults."—The plea concluded with the usual averments of compliance with the requisitions of the Bankruptcy Act, 1861.

Replication.—That the plaintiffs never executed, or ssented or became parties to the said indenture in the lea mentioned, nor were nor are they or their firm, or any gent of theirs, or their said debt, named or mentioned in he said schedule written under or forming part of the said ndenture.

Demurrer, and joinder therein.

M. Howard (*Abbott* with him) argued for the defendant (June 4).—The clause in this deed which requires the creditors to verify their debts is not unreasonable. This case differs from *Leigh* v. *Pendlebury* (*a*), for there the creditors were required to verify their debts by solemn declaration, *or otherwise to the satisfaction of the trustees;* so that both the mode and sufficiency of the verification were left to the discretion of the trustees. There *Erle*, J., said that "a clause giving the trustee power to admit or reject a debt which he might deem insufficiently proved was most unreasonable." So a clause was held unreasonable which provided that the composition money should not be payable until the trustee certified that the requisite majority in number and value of creditors had assented to the deed: *Boulnois* v. *Mann* (*b*). But in *Coles* v. *Turner* (*c*) it was held in the Exchequer Chamber that a clause which empowered a trustee to require any creditor to verify his debt by solemn declaration or otherwise as the trustee might think fit," was not unreasonable, because a creditor who failed to produce proof to the satisfaction of the trustee would not be deprived of all benefit under the deed. The Court, however, refrained from expressing any opinion as to whether the provision in *Leigh* v. *Pendlebury* was or was not in itself unreasonable. [*Pollock*, C. B.—I cannot understand

(*a*) 15 C. B. N. S. 815. (*b*) 4 H. & C. 9.
(*c*) 35 L. J. C. P. 169.

1866.
GIDDINGS v. PENNING.

what right there is to create a forfeiture of the debt upon non-compliance with the requisition. Under the bankrupt law a creditor does not forfeit his debt by reason of a tardy claim.] Some provision is necessary to compel a creditor to prove his debt within a reasonable time, and the only question is, whether the forfeiture of the debt is too severe a penalty. [*Pollock*, C. B.—Why is a creditor who resides in London to lose his debt, but not a creditor who resides in Paris?] The statutory majority of creditors are the best judges of what is reasonable. Forfeiture of the debt in the event of a creditor suing the debtor would be unreasonable, because every creditor has a right to contest the validity of the deed; but this case is different, since it is the interest of all the creditors that the estate should be administered without delay.

Macnamara, for the plaintiffs.—This clause invalidates the deed on the ground of inequality and unreasonableness. It creates an inequality, because the penalty attaches upon those creditors only who are in Great Britain and Ireland. It is also unreasonable that a creditor should forfeit his debt because he fails to verify it within a specified time. [*Martin*, B.—Such a clause was not unusual in the old composition deeds.] Those deeds only bound the creditors who assented to them. In *Leigh* v. *Pendlebury* (a) *Erle*, J., after stating that it seemed to him "altogether unreasonable to call upon a creditor to submit his claim to the decision of the trustee," proceeds to say that "the clause which declares the debt forfeited if the creditor shall seek to substantiate his claim by action is also unreasonable." *Coles* v. *Turner* (b) proceeded on the ground that the clause in question only vested in the trustees the same power of admitting or rejecting a claim which they would have had if the clause had not been in the deed; and moreover the

(a) 15 C. B. N. S. 815. 830. (b) 35 L. J. C. P. 169.

clause did not impose any penalty on those creditors who failed to produce what the trustee thought sufficient proof of the debt. Here, if a creditor disputed the validity of the deed, he would incur the penalty for not verifying his claim. In *Lyne* v. *Wyatt* (*a*), where the same penalty attached upon the breach of a covenant not to sue the debtor, the provision was held unreasonable.

M. Howard, in reply, cited *Scott* v. *Berry* (*b*).

Cur. adv. vult.

CHANNELL, B., now said.—This case came before the Court on demurrer to a replication, and the question turns on the validity of a deed of arrangement under the Bankruptcy Act, 1861. The points raised in the course of the argument resolve themselves into two. It was sought to invalidate the deed because it contained a clause which provides "that it shall be lawful for the trustees, at the expense of the estate, to require the amount of any debt of any creditor to be verified by a solemn declaration; and in the event of such creditor, if in Great Britain or Ireland, failing to verify such debt for two calendar months after such requisition, such creditor should lose all benefit, dividends, and advantages to be derived from the deed, and thereupon such dividends shall fall into the general estate for the benefit of the creditors not making similar default."

There are two matters for consideration: first, what the creditor is required to do; and, secondly, the consequence which attaches if he fails to comply with the requisition. In the course of the argument I entertained some doubt, but, after consideration, I have arrived at the conclusion that, taking this stipulation in its entirety, it is unreasonable.

(*a*) 18 C. B. N. S. 593. (*b*) 3 H. & N. 966.

1866.
GIDDINGS v. PENNING.

I do not think it unreasonable that the trustees should require the amount of any debt to be verified by solemn declaration. I consider the declaration a substitute for the affidavit in bankruptcy; and, however unreasonable it would be to require a declaration *to the satisfaction of the trustees*, so that they might take an objection to it, possibly captious or otherwise, that does not apply to the first part of this stipulation. Fairly read, it only requires that a person claiming to be a creditor for a certain amount, shall make, not an affidavit, but a solemn declaration that he is a creditor to that amount. If the declaration be good in point of fact the trustees have no right to object to its sufficiency. It would be different if the deed required a declaration to be made of the existence of a debt to the satisfaction of the trustees. I therefore wish it to be understood that with the first part of this stipulation I find no fault.

Then the clause goes on to provide that if any creditor shall fail to verify his debt within a certain time, if within Great Britain or Ireland, he shall lose all benefit, dividends and advantages to be derived from the deed, and the dividends to which he would have been entitled are to fall into and form part of the general residue in which he is not to participate. Cases frequently arise in bankruptcy where a creditor who proves his claim at a late period of the proceedings is not entitled to disturb prior dividends, but is allowed his full share of the future dividends. Here there is an express provision that, if the creditor does not make the declaration within the prescribed time, he shall forfeit his debt. Looking at the second part of the clause, which I cannot separate from the first, it appears to me that such a stipulation renders the deed unreasonable, and therefore not binding on non-assenting creditors.

BRAMWELL, B.—I am of the same opinion; and I have nothing to add to the judgment of my brother *Channell.*

MARTIN, B.—I am rather inclined to a contrary opinion. My reason for thinking that this provision does not invalidate the deed is, that a similar provision was commonly inserted in the old composition deeds, as will be found on reference to the precedents in Forsyth on Composition with Creditors (*a*).

Now the question turns on the 192nd and 193rd sections of the Bankruptcy Act, 1861. The 192nd section is the first which has reference to this subject, and it is introduced thus :—"As to trust deeds for benefit of creditors, composition and inspectorship deeds executed by a debtor." Then it proceeds to enact that "every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor," &c., shall be binding on all the creditors, provided certain conditions are observed. I concurred with the judgment of *Parke*, B., in *Tetley* v. *Taylor* (*b*), with respect to the law under the 12 & 13 Vict. c. 106; but in consequence of the judgment of the Court of Queen's Bench in *Clapham* v. *Atkinson* (*c*), and the opinion expressed by Lord *Westbury*, C., in *Ex parte Morgan* (*d*), I have no hesitation in saying that my view of the subject is somewhat changed. If, therefore, the matter rested with me, I should be disposed to hold that this clause, which was commonly inserted in the old composition deeds, did not affect the validity of this deed.

(*a*) Page 175, 1st ed. This clause has been expunged from the precedents in the subsequent editions, the learned author having entertained doubts as to its legality: See p. 260, 3rd ed.

(*b*) 1 E. & B. 521. 542.

(*c*) 4 B. & S. 722.

(*d*) 1 De Gex, J. & S. 288.

1866.
GIDDINGS v. PENNING.

POLLOCK, C. B.—I agree with my brothers *Bramwell* and *Channell*, that this clause, by which, in a certain event, a creditor forfeits his debt, is unreasonable, and consequently the deed is void.

The ground of my opinion is, that apparently the spirit and intention of the law on this subject is founded upon the application of the principles of the bankrupt law to arrangements amongst creditors themselves, when a specified proportion in number and value unite and effect an arrangement for the benefit of all the creditors, without the expense of proceedings in bankruptcy. It seems to me that the object of the law was to produce, through the medium of a majority in number and value of creditors, what may be called a bankrupt arrangement, and to give effect to the bankrupt law without an appeal to the Court of Bankruptcy. The clauses in the Act by which the minority of creditors are bound by the majority are in accordance with the bankrupt law, which confers on a certain majority in number and value of creditors the power of granting a certificate, which operates as an effectual release to the bankrupt from all his debts. But in no part of the bankrupt law is there anything which appears to me to justify the introduction of this penal clause, that because a creditor does not, within a certain time, verify the amount of his debt by a solemn declaration he shall absolutely forfeit it. I think such a clause extremely unreasonable. I do not agree with my brother *Martin*, that because a similar clause is found in a deed of composition which binds no one but the creditors who are parties to it, this clause cannot be said to be unreasonable. Such a clause may not be unreasonable quoad creditors who consent to it, and who, on becoming parties to a composition deed, agree that any creditor who does not verify his debt shall lose all benefit under the deed. But that is

not the case here. This is a statutable provision for the purpose of producing the effect of bankruptcy through the medium of the creditors themselves. A certain majority in number and value of creditors binds the rest, and it seems to me most unreasonable that non-assenting creditors should forfeit all their rights under the deed because they do not within a certain time verify their debts.

This view is supported by the judgment of the Court of Exchequer Chamber in *Coles* v. *Turner* (*a*), where it was held that in a deed of assignment a clause which empowered a trustee to require any creditor to verify his debt, but which *had not the effect of depriving the creditor who failed to do so of all benefit under the deed,* was not unreasonable. That was the unanimous judgment of six Judges, reversing the judgment of the Court of Common Pleas who held the deed unreasonable and therefore void. *Blackburn,* J., in delivering the judgment of the Court of Exchequer Chamber, said:—"It will be found that the provision in this deed, perhaps, requires no more from the creditor than would be required if the deed were silent. At all events it requires nothing unreasonable beyond what would be thus required. It does not make the trustee arbitrator, finally to decide whether there is any debt, or what is the amount of that debt; nor does it impose any penalty on those creditors who fail to produce what the trustee thinks sufficient proof of the debt." This conclusion follows, that if the deed had contained the provision now under consideration, namely a forfeiture of the debt, it would have been pronounced unreasonable, and the deed void.

I am not now called upon to decide what provision would have been reasonable, but only to decide whether a forfeiture of all right to participate under the deed is or is

(*a*) 18 C. B. N. S. 736.

1866.
GIDDINGS v. PENNING.

not unreasonable in the case of a creditor who does not assent to the deed and is only bound by force of the act of parliament. Had the deed provided that any creditor who failed to verify the amount of his debt should forfeit all share in the distribution about to take place, and that if he afterwards proved he should participate without disturbing former dividends, that would have been in accordance with the bankrupt law; but I think that the provision in this deed is unjust and contrary to the spirit of the bankrupt law, and therefore unreasonable.

Judgment for the plaintiffs.

June 6.

BYRNE *v.* THE MERCANTILE INSURANCE COMPANY, LIMITED.

A marine policy of insurance contained the following clause:—"The usual deduction of one-third of the amount of repairs will not be made by this Company in the case of ships built within the limits of the United Kingdom until after eighteen months, or in the case of Colonial built ships until after twelve months from the date of the builder's certificate; but after such dates respectively the deduction will be made." By custom, underwriters make a deduction of one-third, new for old, only in respect of repairs made *after the first voyage of a vessel.—Held*, that the expression "usual deduction" had reference to the quantum only, and that in the case of a Colonial built ship the underwriters were entitled to make the deduction of one-third, after twelve months from the date of the builder's certificate, although the ship had not completed her first voyage.

THIS was an action to recover 1002*l.* 3*s.* 8*d.* under a policy of insurance. By consent of the parties and order of a Judge, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of this Court, without pleadings:—

It has been for many years a custom amongst underwriters, in cases of losses under policies which have not contained the special clause set out in the policy hereinafter mentioned, to make a deduction of one-third, new for old, only in respect of repairs made after the first voyage of a vessel.

By a policy of insurance effected with the defendants, ed the 9th day of December, 1864, the plaintiff, who is owner of the ship "Melmerly," insured that vessel at l from Bombay to Liverpool.

The policy contains the following clause:—

"N.B.—The usual deduction of one-third of the amount repairs will not be made by this Company in the case ships built within the limits of the United Kingdom til after eighteen months, or in the case of Colonial built ips until after twelve months, from the date of the builder's rtificate, but after such dates the deduction will be made."

The "Melmerly" was a Colonial built ship and the yage insured was her first.

During the voyage insured, but after twelve months m the date of the builder's certificate, the ship received mage and was repaired; and the plaintiff claims from defendants the full amount of the repairs as a particular rage loss.

The defendants have paid 669*l.* 2*s.* 2*d.*, being the amount the claim after deducting 333*l.* 1*s.* 6*d.*, being the allowe they claim in respect of new for old materials.

The question for the opinion of the Court is, whether defendants are liable to the plaintiff for the full amount the repairs without any deduction of new for old. If y are, judgment is to be entered for the plaintiff for 3*l.* 1*s.* 6*d.* with costs. If they are not, judgment is to entered for the defendants with costs.

Mellish, for the plaintiff.—The defendants are liable for full amount of repairs. If the policy had not contained s special clause, it is clear that no deduction could have en made, because the insurance was on the ship's first yage. Then does the clause mean that the deduction ll, at all events, be made after the expiration of the periods

1866.

BYRNE v. MERCANTILE MARINE INSURANCE COMPANY.

specified, or does it leave the custom still applicable? It is submitted that, according to the true construction, the custom applies. The clause was introduced for the benefit of the assured, not of the underwriters. The expression "*usual* deduction" means the deduction made after the first voyage, and the word "deduction" in the latter part of the clause should receive the same construction. The defendants, by extending their liability, hold out an inducement to shipowners to insure with them. They, in effect, say that the deduction usually made after the first voyage will not, after that time, be made until the expiration of the respective periods of eighteen months and twelve months from the date of the builder's certificate.

Milward (*Herschell* with him), for the defendants.—The bargain between the parties excludes the custom. The intention was that at the expiration of the periods mentioned the defendants should have an absolute right to make the deduction, which, under ordinary circumstances was subject to the condition of the vessel having made her first voyage. The words "but after such dates respectively the deduction will be made" shew that the right to make the deduction attaches upon the expiration of the eighteen months and twelve months, although the ship may then be on her first voyage. On the other hand, if the ship made several voyages within the twelve months, during all that time the defendants would be bound to pay the full amount of repairs without any deduction.

Mellish replied.

MARTIN, B.—I am of opinion that the defendants are entitled to judgment. Whatever may have been the intention of the parties we must give a construction to the words

they have used. In the first part of the clause there is the expression "the usual deduction," and in my opinion "the deduction" in the latter part has the same meaning. The clause commences: "The usual deduction of one-third of the amount of repairs will not be made by this Company in the case of ships built within the limits of the United Kingdom until after eighteen months, or in the case of Colonial built ships until after twelve months from the date of the builder's certificate." If it had stood there, I should have been disposed to think that the argument of Mr. *Mellish* was right. But it seems to me that the intention of the defendants was to hold out a bonus or temptation to shipowners to insure with them by substituting this contract for the custom. The clause then goes on: "but after such dates respectively the deduction will be made." Then what deduction is that? It seems to me that it means the deduction mentioned at the commencement of the clause. That being so, there is an express contract that after the dates respectively mentioned the usual deductions will be made. My impression is that this construction is in accordance with the intention of the parties.

BRAMWELL, B.—I am reluctant to add anything to what my brother *Martin* has said, since his view of the case so entirely coincides with my own. Moreover, I am inclined to think that this construction is what the parties meant. Very likely they intended to substitute certain fixed periods in order to avoid trying that inconvenient question "what is a first voyage?" If a ship completed her first voyage within a month it would be unreasonable that shortly afterwards the underwriters should make a deduction of one-third new for old in respect of the repairs. It is therefore probable that the parties intended to substitute for the custom a stipulation more reasonable.

1866.

BYRNE v. MERCANTILE MARINE INSURANCE COMPANY.

This, however, is a question of construction; and I think it tolerably clear that the defendants are right. The expression "usual deduction," in the first part of the clause, might mean "usual deduction after the first voyage;" but that would be a singular interpretation of the word "usual" when applied to "deduction" in the latter part of the clause, where it indicates the quantum of deduction, not the circumstances under which it is to be made. Therefore, although if the first part of the clause had stood alone the expression "usual deduction" might have meant "usual deduction after the first voyage," yet, inasmuch as it does not stand alone, but in connection with the word "deduction" in the latter part of the clause, it seems to me that by the expression "usual deduction" nothing more is meant than a deduction of one-third, which is to be made after the periods mentioned. I think that whatever sense is attached to the expression "usual deduction" in the first part of the clause, must also be attached to the word "deduction" in the latter part, where the word "usual" is not used; and that if the words "after the first voyage" are interpolated in the first part of the clause, they must also be interpolated in the latter part, which must then be read, "but after such dates respectively the deduction will be made after the first voyage." That, however, would be repugnant and absurd. It seems to me, therefore, that the word "usual" must be limited to the quantum of deduction, and not include the time when it is to be made; and, consequently, the true interpretation is that given by my brother *Martin*.

CHANNELL, B.—I do not think it necessary to speculate upon what may possibly have been the intention of the parties. The duty of the Court is to put the best construction they can upon the words which the parties have used.

I think that the expression "usual deduction" has reference to the quantum, and not to the first voyage. I am satisfied that the true meaning of the clause is that during certain limited periods the underwriters will not make the usual deduction of one-third, but after the expiration of those periods respectively the deduction will be made.

PIGOTT, B.—I am of the same opinion. At first I was disposed to take a different view, but on considering the words "but after such dates respectively the deduction will be made," and giving full effect to those words, I think that the defendants are entitled to judgment.

Judgment for the defendants.

BAINES and Another *v.* EWING.

June 2.

A broker at Liverpool was authorized by his principal in London to underwrite in the name of the latter policies of marine insurance, not exceeding 100*l.* on any one vessel. The broker underwrote a policy for 150*l.* It is well known in Liverpool that the amount for which a broker can underwrite the name of his principal is limited, but the limit is not disclosed. In an action on the policy:—*Held*, that the broker having exceeded his authority, and the contract being indivisible, the policy was void.

DECLARATION on a policy of insurance on the ship "City of Brisbane." The declaration was in the ordinary form, and averred that the defendant subscribed the policy for the sum of 150*l.*

Plea.—That the defendant did not subscribe the policy, and did not become an insurer as alleged.—Issue thereon.

At the trial, before *Lush*, J., at the last Liverpool Spring Assizes, the following facts were admitted by counsel.—In July, 1861, the defendant, who resided at Richmond, near London, authorized Messrs. North, Ewing & Co., insurance brokers at Liverpool, to underwrite policies on marine risks in his name, to the extent specified in the written authority sent to them, which was as follows:—

1866.
BAINES v. EWING.

"Messrs. North, Ewing & Company.

"Gentlemen,

"I hereby authorize you, in my name, on my behalf, to underwrite policies of insurance against marine risks not exceeding 100*l.* by any one vessel; and I authorize you to hold and retain all premiums received for me as a fund to answer losses, it being understood that all accounts between us are to be settled according to the usual course of transacting business between an underwriter and a broker, as customary in Liverpool; separate deposit account to be kept at the bank, and accounts to be rendered half yearly. "I remain, &c.,

"William Ewing."

"Richmond, 26th July, 1861."

At Liverpool there is an Underwriters' Association, and when a person desires to become an underwriter he authorizes a broker to underwrite for him. The broker submits the name of his principal to the Underwriters' Association, and, if no objection is made to it, the name is entered in their book, and then the broker underwrites in the name of his principal. From the time that the defendant gave to Messrs. North, Ewing & Co. the above authority to underwrite for him, they signed policies in his name. It is well known in Liverpool that in almost all cases, if not in all, a limit is put to the amount for which the broker can sign his principal's name. The principal allows the broker to sign for a fixed sum on each of any number of ships, and on any terms he pleases; but when the principal's name is given to the Association that limit is not mentioned, and it is, in fact, known only to the broker and his principal. The plaintiffs did not know of the limit imposed by the defendant, nor that it had in this case been exceeded; neither was the defendant aware until afterwards that the limit had been exceeded, nor did he subsequently ratify the act of his broker. On the 2nd October, 1862,

and whilst the above authority was in force, the policy on which this action was brought was underwritten by Messrs. North, Ewing & Co. in the defendant's name for 150*l.* The ship was totally lost. By consent a verdict was entered for the plaintiffs for 150*l.*, leave being reserved to the defendant to enter a nonsuit or a verdict for him, or to reduce the damages to 100*l.*

Edward James, in last Easter Term, obtained a rule nisi accordingly, on the ground that there was no evidence of authority given by the defendant to underwrite the policy; against which

Brett and *Quain* now shewed cause.—First, the defendant is liable on this policy to the extent of 150*l.* He held out the brokers as his agents, to underwrite for him; and although they were not general agents for all purposes, they were for the particular purpose of signing policies in his name. A general agent is a person whom a man puts in his place to transact all his business of a particular kind: Smith's Mercantile Law, p. 128, 7th ed. In the case of a general agent "the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending or prohibiting the exercise of such authority under particular circumstances:" Story on Agency, § 126, p. 151, 4th ed. The business of an underwriter could not be carried on if the assured was bound on every occasion to inquire into the extent of the agent's authority. Of whom is he to inquire? If the agent says that he is authorized to underwrite for 150*l.* must inquiry be made of the principal in London whether that is true? The restrictions to which the agent is subject, even where he exceeds his authority, do

1866.
BAINES v. EWING.

not avoid the policy unless the assured had knowledge of them. If the restrictions are private and confidential they are, as against third persons, inoperative and void, unless disclosed: Duer on Marine Insurance, §§ 49, 50, p. 346, note (*b*), p. 347. Then the question is, what are the usual incidents of an agency to underwrite in the principal's name? One of them is to underwrite for different amounts according to the agent's discretion. Is that altered by the fact that it is well known in Liverpool that in almost all cases the agent's authority is limited, but the limit is not made known to the public? The authority of a general agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order or direction not known to the party dealing with him: Smith's Mercantile Law, p. 128, 7th ed. In Story on Agency, § 127, p. 153, 4th ed., it is said that "if a person is held out to third persons, or to the public at large, by his principal as having a *general* authority to act for and to bind him *in a particular business* or employment, it would be the height of injustice, and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent, limiting that authority." If the limit is not disclosed it is the same as if there was none. Where a factor has private instructions from his principal not to sell under a certain sum, and he sells for less, the principal is bound. This case is within the law, as laid down in Story on Agency, § 131, p. 185, 4th ed.

Secondly, the defendant is liable, at all events, to the extent of 100*l.*, because he has authorized his agents to underwrite for that amount. "Where a man does less than the authority committed to him, the act is void; but where he does that which he is authorized to do and something more it is good for that which is warranted and void for the rest:" Co. Litt., 258 a. [*Bramwell*, B.—I can well

ınderstand that if a man is authorized to make a feoffment of one acre and he makes a feoffment of two, it is good for the one and void as to the other; but a contract is an entire thing and indivisible. *Martin*, B.—If the defendant is bound at all, he was bound when his agent signed the policy.]

Edward James, *Mellish* and *Holland* appeared to support the rule, but were not called upon to argue.

MARTIN, B.—As to the last point, I think it scarcely arguable. This is an entire and indivisible contract to pay 150*l.*; and it is not valid because the broker had authority only to make a contract to the extent of 100*l.*

With respect to the other point, it seems to me clear. A contract was made by an agent on behalf of his principal; and an action having been brought against the principal upon that contract, it became necessary for the plaintiff to prove the agent's authority to make it. Accordingly he produced and proved this document: "I hereby authorize you, in my name, on my behalf, to underwrite policies of insurance against marine risks *not exceeding* 100*l.* by any one vessel." That authority was produced to prove a declaration which alleges that a policy was subscribed by the defendant for 150*l.* If it had stood there, it would be obvious that the agent made a contract which he had no authority to make. But then it is said that there is a course of business in Liverpool by which brokers acting on behalf of underwriters make valid contracts in the names of their principals. But it is well known that a limit is placed upon the amount for which the broker can sign his principal's name. In this case the broker could sign for 100*l.* on any number of ships. When the name of the underwriter is given to the Underwriters' Association the

1866.
BAINES v. EWING

limit is not disclosed, and it is known only to the broker and his principal. Now, the plaintiff having produced the written authority, by which the contract contained in this policy was certainly not authorized, it is contended that, by reason of the course of business in Liverpool, there was virtually an authority to underwrite for 150*l.*, because it is well known that there is some limit, and therefore every man who makes a contract of this kind has notice that he is dealing with an agent who has only a limited authority. But when a principal has put a limit to his agent's authority, and a person contracts with knowledge that there is always some limit, how can it be said that the agent may bind his principal to a greater extent than the limit? This view is in accordance with common sense, and no refinements of text writers can alter it.

BRAMWELL, B.—I am of the same opinion. The actual authority given to the agent cannot be relied on, and therefore the counsel for the plaintiff are obliged to rely upon a supposed authority which the agent had not, that is to say, that the principal held out the broker as his agent having authority to sign policies in his name for more than 100*l.* But that is not true. The utmost that can be said is that the principal held out the broker as having that authority which a Liverpool broker ordinarily has. It seems to me almost a matter of logical demonstration that the plaintiff's proposition is erroneous. What would have been the case if there had been no limitation upon Liverpool brokers in general it is unnecessary to say, and it might give rise to a question of some difficulty.

Reference has been made to Story on Agency, § 131, where it is said that the distinction between general agents and limited or special agents may be illustrated by the case of a factor who has a general authority to sell; and if in

ling he violates his private instructions, the principal is vertheless bound. Amongst others, the case of *Fenn* v. *rrison* (*a*) is cited, but it does not warrant the proposi- n. I can well understand that if a factor is simply ployed to sell, he has a general authority to sell in the al way; but I doubt whether when a factor is authorized sell at a particular price he can bind his principal by a e at a less price. I do not think that any of the autho- ies referred to by Mr. Justice *Story* warrant such an erence.

Again, we are asked how is the business of an under- iter to be carried on if the assured is bound on every casion to inquire into the extent of the broker's autho- y. The answer is twofold: first the business *is* carried ; and, secondly, it will and ought to be carried on by e assured trusting to the honesty of the broker that he not telling an untruth when he assumes not to exceed a authority. Generally speaking the trust is well founded, r although brokers sometimes pledge the credit of their incipals beyond what is right, they do not usually exercise authority which they do not possess.

CHANNELL, B.—I am of opinion that so much of the le as seeks to set aside the verdict for the plaintiff and ter a nonsuit ought to be made absolute. With respect the other branch of the rule, which seeks to reduce the amages, it only becomes important in one point of view, r if the defendant is right in his contention the plaintiffs nnot sever the amount and maintain their verdict with 00*l.* damages.

The question is, therefore, whether the defendant is liable n the policy declared on. Now, the express authority iven by the plaintiff not only does not establish a liability,

(*a*) 3 T. R. 757. 762.

1866.
BAINES v. EWING.

but negatives it. But then it is said that we ought not to look at that authority simpliciter, but in connection with the fact that the limit is never disclosed; and it is contended the authority given to a general agent cannot be limited by secret instructions from his principal inconsistent with that authority. I do not wish to interfere with that as a general rule of law; nor do I think that in order to apply that rule the agent must be a general agent for all purposes. Perhaps the expression is incorrect, but there may be a special general agent, for instance, an agent to sign bills of exchange or subscribe policies of insurance; and although his authority does not extend to other matters, it may be general as to the particular business in which he is employed. But looking at the facts of this case, and the admission that it is well known in Liverpool that there is a limit to a broker's authority to underwrite policies, although the precise amount is not disclosed (which I think makes no difference), I am of opinion that the broker was not in the situation of a general agent so as to make applicable the rule of law relied on in the argument for the plaintiffs.

For these reasons I agree that the rule to enter a nonsuit ought to be absolute.

Rule absolute for a nonsuit.

1866.

VANDENBERGH *v.* SPOONER. *June* 12.

The defendant signed the following bought note:—"D. S. agrees to buy the whole of the lots of marble purchased by V., now lying at Lyme at 1*s.* per foot."—*Held*, no sufficient memorandum in writing within the 17th section of the Statute of Frauds, inasmuch as it did not appear by reasonable construction or necessary intendment that V. was the vendor.

DECLARATION for goods bargained and sold.

Plea: never indebted.—Issue thereon.

At the trial, before *Bramwell*, B., at the Middlesex Sittings in last Hilary Term, it appeared that in November, 1865, a quantity of marble was sold by auction at Lyme Regis, in Dorsetshire, when the plaintiff became the purchaser of several of the lots. After the auction, the plaintiff agreed to sell the marble to the defendant, and the following bought and sold notes were respectively signed by them:—

"Bridport, Nov. 17, 1865.

"D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenbergh, now lying at the Lyme Cob, at 1*s.* per foot.

"David Spooner."

"Mr. J. Vandenbergh agrees to sell to Mr. D. Spooner his several lots of marble purchased by him, now lying at Lyme, at 1*s.* the cubic foot, and a bill at one month. Bridport, Nov. 17, 1865.

"Julius Vandenbergh."

There was conflicting evidence as to whether the sale was upon the terms contained in the bought or the sold note. The defendant had refused to accept any part of the marble.

It was submitted on behalf of the defendant that there was no sufficient memorandum of the bargain, within the 17th section of the Statute of Frauds, inasmuch as the note signed by the defendant did not contain the name of the seller *as seller*.

1866.

VANDEN-BERGH v. SPOONER.

The learned Judge left it to the jury to say what was the real contract between the parties. The jury found that the real contract was contained in the note signed by the defendant; and they accordingly found a verdict for the plaintiff for 35*l.*, leave being reserved to the defendant to move to enter a nonsuit.

Karslake, in the same Term, obtained a rule nisi accordingly; against which

Huddleston and *Hannen* shewed cause in the present Term (May 22).—The note signed by the defendant is a sufficient memorandum of the bargain, within the 17th section of the Statute of Frauds. That enactment only requires the memorandum to be "signed by the parties to be charged by such contract." Here the memorandum is signed by the defendant, and it contains the name of the plaintiff. No particular form is required; it is sufficient if it appears by reasonable intendment who is the vendor: Blackburn on Contract of Sale, p. 55. If a bill is headed A. B. to C. D., and is signed by A. B. that is a compliance with the statute. Where the vendor's name only appeared on the fly-leaf of an order book in which the defendant had signed his name at the foot of the order, that was held a sufficient memorandum of the contract: *Sarl* v. *Bourdillon* (*a*). [*Martin*, B.—The defendant agrees to buy the marble Vanderbergh purchased, and I should say that by reasonable intendment it appears that Vandenbergh was the vendor.] This case differs from *Williams* v. *Lake* (*b*), for there the vendor's name did not in any way appear on the face of the memorandum. It was an attempt to make a contract between A. and B. a contract between A. and Z. The reasonable construction of this document is that Vandenbergh was the vendor of the marble he had purchased.

(*a*) 1 C. B. N. S. 188. (*b*) 2 E. & E. 349.

A document repudiating a contract may operate as a sufficient memorandum to satisfy the statute: *Bailey* v. *Sweeting* (*a*). At all events extrinsic evidence is admissible to shew that Vandenbergh was the vendor: *Macdonald* v. *Longbottom* (*b*).

Karslake and *Kingdon*, in support of the rule.—As the bought and sold notes differ, there is either no contract or it is contained in the note signed by the defendant. But to satisfy the statute the vendor's name must appear in the note *as vendor*. In *Williams* v. *Lake* (*c*) *Hill*, J., said that "no document can amount to such a memorandum or note unless it specifies upon its face, either explicitly or by reasonable construction, not only the subject-matter, but the names of the contracting parties." Here the plaintiff's name is only mentioned by way of identifying the marble sold. Suppose a third person had produced this document, and, claiming as vendor, had received from the defendant the price of the marble, could the plaintiff compel the defendant to pay it over again, on the ground that, according to the true construction of the document, the plaintiff was the vendor? [*Martin*, B.—In the first place it would be proved that there was a contract between the plaintiff and defendant. The statute requires a memorandum in writing of the contract, but that document must be read with the light of what previously took place.] That would be admitting parol evidence of the contract, which it was the object of the statute to exclude. It must appear on the face of the document itself who are the contracting parties: *Champion* v. *Plummer* (*d*). [*Bramwell*, B.—Suppose a man signs a memorandum by which he agrees to buy the house No. 20, Strand, for 2000*l.*, would that be a good

(*a*) 9 C. B. N. S. 843.
(*b*) 1 E. & E. 977.
(*c*) 2 E. & E. 349. 355.
(*d*) 1 N. R. 252.

1866.
VANDEN-BERGH v. SPOONER.

memorandum of a contract with the owner of the house? If it would not because the owner's name is not mentioned, how does it become good by shewing who the owner is? *Channell*, B.—If J. Smith is named in the document as vendor, evidence may be adduced to shew which J. Smith is meant; but if the vendor is not mentioned, it cannot be shewn by extrinsic evidence that he is J. Smith.] Although for some purposes surrounding circumstances may be looked at, the parties to the contract and the subject-matter must appear on the face of the memorandum. It cannot be implied from this document that the plaintiff was vendor; it is consistent with the language used that he had purchased the marble as broker. *Sarl* v. *Bourdillon* (*a*) has no bearing on this case, for it only decided that the vendor's name, which was written on the fly-leaf of the order book, might be incorporated into the contract. But *Boydell* v. *Drummond* (*b*) shews that parol evidence cannot be given to connect signatures in a book with a prospectus containing the terms of the contract.

Cur. adv. vult.

BRAMWELL, B., now said.—The question in this case turns upon whether there was a sufficient memorandum in writing, within the 17th section of the Statute of Frauds, to bind the defendant as a purchaser of goods. A memorandum was produced, signed by him, not mentioning the seller's name *as seller*, but only in this way, that the defendant agreed to buy certain goods "purchased by Mr. Vandenbergh," the plaintiff; and the question is, whether, as a matter of construction or reasonable intendment (no matter which expression is used), we can say that the plaintiff was the seller. We have come to the conclusion that we cannot. On reading the document, we may speculate or

(*a*) 1 C. B. N. S. 188. (*b*) 11 East, 142.

1866.

VANDENBERGH v. SPOONER.

guess that he was the seller, but we are unable to say that such is the construction or reasonable intendment of the document. There is, therefore, in our opinion, no sufficient memorandum in writing within the 17th section of the Statute of Frauds, inasmuch as the name of the seller, *as seller*, does not appear. The rule must therefore be absolute to enter a nonsuit.

MARTIN, B.—I do not differ from this judgment, but I am not altogether satisfied that this document is not a sufficient memorandum within the statute.

Rule absolute.

HATTERSLEY and Others *v.* BURR.

May 28.

A Local Board of Health has no power, under the 34th section of "The Local Government Act, 1858," to make a bye-law, that before beginning to dig or lay the foundation of any new building a written notice thereof of one month at the least shall be left with the clerk at one of the monthly meetings of the Board, accompanied with plans and sections; and whosoever shall neglect or refuse to give such notice shall be liable to a penalty not exceeding 5*l*.

If a person gives a Local Board notice of his intention to build, and leaves with them plans and sections, he may at once commence the building, subject to the right of its being altered or pulled down if not in conformity with the bye laws of the Board.

CASE stated by two justices for the West Riding of Yorkshire, under the 20 & 21 Vict. c. 43, for the opinion of this Court (so far as material), as follows:—

At a petty Sessions, holden at Keighley, on the 1st December, 1865, an information was preferred by W. Burr, as clerk to the Local Board of Health for the district of Keighley (the respondent), against G. Hattersley and others (the appellants), under section 24 of the bye-laws of the Keighley Local Board of Health (made on the 19th July, 1864, and confirmed by the Secretary of State for the Home Department on the 28th August), charging for that the said G. Hattersley and others, on the 4th October,

1866.

HATTERSLEY v. BURR.

1865, at the parish of Keighley, in the said riding, before beginning to erect a certain new building, situate at Mill Hill, in Keighley aforesaid, and within the limits of the said Board of Health, unlawfully did neglect to leave with him, the said W. Burr, as clerk to the Keighley District Local Board of Health, a written notice of one month at the least, at one of the monthly meetings of the said Board, accompanied with detail plans and sections of such buildings, as required by the bye-law, No. 24, of the bye-laws of the Keighley Local Board of Health, contrary to such bye-law, and which said bye-law was, at the time of the commission of the said offence, and also at the date of the said information, in force within the limits of the district of the said Board of Health, and contrary to the statute, &c.

The bye-law (so far as material) was as follows:—"Before beginning to dig or lay the foundation of or for any new house or building, or to re-erect any house or building, a written notice thereof, of one month at the least, shall be left with the clerk, at one of the monthly meetings of the Board, accompanied with detail plans and sections of every floor of such house or building, drawn to a scale of not less than one inch to eight feet, &c., and the description, plans and sections, when approved, or a correct copy or tracing thereof, shall be left with the Board . . . And whosoever shall neglect or refuse to give such said notice and description accompanied with the proper plans and sections, or to leave with the Board such descriptions and plans and sections, or correct tracings thereof as aforesaid, when approved; or shall erect or re-erect any house, buildings or conveniences otherwise than in accordance with the description, plans, sections and arrangements approved, fixed, settled and attested by the Board, or in any other way offend against this bye-law, shall be liable for every such offence to a penalty not exceeding 5*l.*, and to a further

penalty not exceeding 40*s.* for every day during which he, she, or they shall suffer such house, building, or conveniences, built, rebuilt or constructed contrary to the order of the Board so to continue; and the Board may, if they think fit, cause such house, building, or conveniences so improperly constructed to be altered, pulled down, or otherwise dealt with as the case may require, and the expenses incurred by them in so doing shall be repaid by the offending party, and be recoverable in a summary manner."

Upon the hearing of the information it was proved, on the part of the respondent, that on the 10th October last the surveyor of the Local Board received from the appellants a plan of a building proposed to be erected by them, which he laid before the Board at a Board meeting the same day.

The meetings of the Board are held monthly. On the 21st October the surveyor accompanied the building and nuisance committee of the said Board to view the site of the intended building, when they found a temporary building in progress, consisting of iron pillars to support the roof, considerably within the lines of the intended walls of the building, and which pillars were boarded round and fixed into foundations of stone, but no stones of any walls nor any foundations were dug out except for the pillars, which foundations for pillars, and the pillars erected thereon, were intended to be permanent.

The plans of the appellants were afterwards passed by the Board, namely, on the 7th November, 1865, previously to the laying of the said information.

The justices convicted the appellants of the offence, and adjudged them to pay 5*s.* and costs.

The question for the opinion of the Court (*a*) is, whether

(*a*) Other questions were raised, but the decision of the Court renders it unnecessary to advert to them.

1866.

HATTERSLEY v. BURR.

the said bye-law, or the portion thereof on which the conviction is based, is bad in law.

If the Court should be of opinion that the conviction was legally and properly made, it is to stand; but if the Court should be of opinion otherwise, the information is to be dismissed.

Kemplay, for the respondent.—The power of the Local Board of Health to make bye-laws and impose penalties for their infringement depends on the 115th section of "The Public Health Act, 1848 (11 & 12 Vict. c. 63), and the 34th section (*a*) of "The Local Government Act, 1858," (21 & 22 Vict. c. 98). The 53rd section of the Public Health Act, 1848, required fourteen days notice to be

(*a*) Sect. 34.—"The 53rd and 72nd sections of the Public Health Act, 1848, shall be repealed; and in lieu thereof be it enacted as follows:—

"Every Local Board may make bye-laws with respect to the following matters; (that is to say):—

"(1.) With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof;

"(2.) With respect to the structure of walls of new buildings for securing stability and the prevention of fires;

"(3.) With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings;

"(4.) With respect to the drainage of buildings, to waterclosets, privies, ash-pits and cesspools in connection with buildings, and to the closing of buildings, or parts of buildings, unfit for human habitation and to prohibition of their use for such habitation.

"And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the Local Board, and as to the power of the Local Board to remove, alter, or pull down any work begun or done in contravention of such bye-laws: Provided always, that no such bye-law shall affect any building erected before the date of the constitution of the district."...

given to the Local Board of Health before beginning to dig the foundations of any new house; and the 72nd section required one month's notice before laying any new street. Those sections were repealed by the 34th section (*a*) of the Local Government Act, 1858, which empowered every Local Board to make bye-laws with respect to the matters therein specified; and to "provide for the observance of the same by enacting therein *such provisions as they may think necessary as to the giving of notices*, &c. The 24th bye-law requires one month's notice to be left with the clerk of the Local Board, at one of the monthly meetings of the Board before beginning to dig or lay the foundation of any new house. It is objected, first, that the bye-law is unreasonable; but there is no foundation for that objection. [*Channell*, B.—The bye-law does not simply require one month's notice, but that a month's notice shall be left with the clerk at one of the monthly meetings of the Board. Could the Board make a provision that if a person about to build met the clerk going to a Board meeting, and gave him the notice, that should not suffice, but that it must be given at one specific period only, recurring at considerable intervals?] The Board may require any notice they think necessary.—Secondly, it is objected that the bye-law does not prescribe any time within which the Board must approve or disapprove of the plans. But if the Board remained silent during the month, at its expiration the building might be commenced. [*Martin*, B.—My impression is that this proceeding is altogether wrong. The Board are empowered to make bye laws with respect to four matters, viz., the level, width and construction of new streets, the structure of walls of new buildings; the sufficiency of the space about buildings to secure a free circulation of air, and the drainage of buildings; and for compelling performance of the bye-laws the Board may

(*a*) *Ante*, p. 526.

1866.
HATTERSLEY v. BURR.

make such provisions as they think necessary as to giving notices, the deposit of plans, the inspection by the Board, and their power to remove, alter or pull down any work begun or done in contravention of such bye-laws. It seems to me that if a person gives notice that he is about to build and deposits plans, he may at once commence building. The Board have power to inspect the building, and if it is in contravention of the bye-laws they may order it to be altered or pulled down.] The 53rd and 72nd sections of the "Public Health Act, 1848," for which the 34th section of the "Local Government Act, 1858," is substituted, contained a provision that the building should not be commenced until the Board had approved of the plans. [*Pollock*, C. B.—The 34th section of the "Local Government Act, 1858," has imposed a restriction on the common law right of people to build as they please; and it is important that the enactment should not be vexatiously carried out. If a person sends his plans to the Board, he has a right to begin building whenever he pleases; he has given them notice of his intention to build, and it is their duty to take care that the building is not in contravention of their bye-law. *Channell*, B.—The argument for the respondents must go to this extent, that a man is liable to a penalty of 5*l.* for building on his own land before the month's notice has expired, although the building is in every respect in conformity with the bye-laws.]

Wills appeared for the respondent, but was not called upon to argue.

Per CURIAM (*a*).—The bye-law is bad; and the conviction was improperly made.

Determination of justices reversed.

(*a*) *Pollock*, C. B., *Martin*, B., and *Channell*, B.

1866.

WRIGHT, Assignee of OUTRAM, a Bankrupt *v.* CHILD. *June* 8.

On the 20th July a sheriff levied under a fi. fa. a judgment debt exceeding 50*l.* At the request of the execution debtor the sheriff's officer postponed the advertisements of the sale until the 25th July, and on the 26th sold the goods without proper care in lotting them, and greatly under their value. On the 1st August the execution debtor was adjudicated a bankrupt, and his assignees brought an action against the sheriff for not advertising the sale as required by the 73rd section of the Bankruptcy Act, 1861, and for negligence in the conduct of the sale.—*Held*, that the interference of the execution debtor did not render the sheriff's officer his agent; and that the sheriff was liable for the loss resulting from the negligent conduct of the sale.

THE first count of the declaration stated that before the bankruptcy of one Outram a writ of fi. fa. was issued out of the Court of Common Pleas against the goods of Outram, directed to the defendant, who was then sheriff of Staffordshire, which said writ was duly indorsed to levy 163*l.* 18*s.* 4*d.*, with interest and costs, the said sum of 163*l.* 18*s.* 4*d.* being the amount recovered in an action brought against Outram by the Governor and Company of the Bank of England: that the writ so indorsed was delivered to the defendant, as such sheriff, to be executed; and that the defendant before the bankruptcy of Outram, seized under the said writ goods and chattels of Outram of a value more than sufficient to satisfy the writ: Yet that, although the execution was upon a judgment recovered in an action for a debt exceeding 50*l.*, the defendant unlawfully, wrongfully, injuriously and negligently sold by auction the goods so seized without publicly advertising the sale thereof on or during the three days next preceding the day of sale, and wrongfully, &c., sold the said goods for a small, inadequate and insufficient price, and for much less than the reasonable price and value, and without taking due and reasonable care in and about the advertising and giving notice, and without giving due and sufficient notice thereof, and negligently and improperly conducted himself in and about the conduct and management of the sale, and wrongfully, &c., converted to his own use a great part of the said goods; and by reason of the premises the sale of

1866.
WRIGHT v. CHILD.

the goods realized a much less sum than it would otherwise have done, and the plaintiff, as assignee of Outram, was deprived of and lost a great part of the bankrupt's estate and effects.

The second, third and fourth counts were similar to the first, but related to other writs.

Pleas (inter alia).—First: not guilty. Secondly: leave and licence by Outram.—Issues thereon.

At the trial, before *Montague Smith*, J., at the last Gloucester Assizes, the following facts appeared.—On the 20th July, 1865, three writs of fi. fa., issued on judgments against Outram, were delivered to the sheriff of Staffordshire for execution. On the same day the sheriff's officer levied on the goods of Outram, and proceeded to make an inventory. On the 21st the officer employed a printer to print bills announcing the sale of the goods by public auction at eleven o'clock on the morning of the 26th. Before the bills were distributed Outram requested the sheriff's officer not to advertise the sale, as he expected to raise sufficient money to satisfy the judgments; and in consequence of that request no advertisement was published until the 25th of July. Outram having failed to raise the money, between nine and ten o'clock in the morning of the 26th the goods were lotted, when, at the request of Outram's attorney, the sheriff's officer postponed the sale from eleven o'clock till twelve. Subsequently, the attorney told the officer that no money was forthcoming, and he could go on with the sale. About two o'clock the sale commenced, and the amount realized was 436*l.* Evidence was given that the goods were not properly lotted, that the sale was hurried and negligently conducted, and that the goods were sold greatly below their value. On the 1st August Outram was adjudicated bankrupt on his own petition, and afterwards the proceeds of the sale were paid

ıe plaintiff, who was official assignee, in pursuance of 73rd section of the Bankruptcy Act, 1861.

was submitted, on behalf of the defendant, that the ıtiff could not recover, inasmuch as the sheriff had d under the directions of Outram.

he learned Judge left it to the jury to say, first, whe- the postponement of the advertisement of the sale was e with the authority of Outram: secondly, whether the was carefully and properly conducted. The jury found Outram prevented the bills of sale being circulated, that proper care had not been used in lotting the ls; and they assessed the damages in that respect at . A verdict was then entered for the plaintiff for that unt, leave being reserved to the defendant to move to r a nonsuit or a verdict for him.

riffits, in the following Term, obtained a rule nisi rdingly, on the ground that the bankrupt had appointed officer as his special bailiff or had by his acts disentitled self from suing the sheriff; against which

Huddleston and *H. James* shewed cause.—First, the iff's officer was not the agent of the bankrupt. The s with respect to the appointment of a special bailiff ın execution creditor have no application. As regards sheriff, an execution debtor is in a very different posi- from that of an execution creditor. A sheriff is an er whom the law appoints as agent of the execution litor, but the latter may, if he thinks fit, have his own er. An execution debtor has no right to interfere or trol the proceedings of the sheriff. The officer is nd to act in obedience to the writ, and cannot make ontract with the debtor that he shall cease to be the esentative of the sheriff. Besides, the interference of debtor only caused the postponement of the advertise-

1866.
WRIGHT v. CHILD.

ment of the sale; and the loss in respect of which the jury assessed the damage was caused by negligence in the conduct of the sale. The sheriff, having received the proceeds of the sale on behalf of the plaintiff and paid them over to him, cannot now deny that he was the plaintiff's agent: *Cook* v. *Palmer* (*a*). Even where a special bailiff is appointed the sheriff is responsible for the safe custody of the debtor after his arrest under a ca. sa.: *Taylor* v. *Richardson* (*b*). Secondly, the assignee is not estopped by the acts of the bankrupt. By the 73rd section of the Bankruptcy Act, 1861, the execution was an act of bankruptcy, and the debtor having been adjudged a bankrupt within fourteen days from the day of sale the sheriff was bound to pay over the proceeds of the execution to the assignee. The 74th section requires that where the goods of a debtor are sold under an execution for a sum exceeding 50*l.*, they shall be sold by public auction "and such sale shall be publicly advertised by the sheriff on and during three days next preceding the day of sale."

Mellish and *Griffits*, in support of the rule.—The questions are, first, could the bankrupt have maintained this action? and, secondly, if he could not, is his assignee in a better position? First, the bankrupt, by interfering with the execution, made the bailiff his agent. Where an execution creditor appoints a special bailiff, the sheriff is responsible to the debtor for the improper conduct of the sale. The converse is equally true, that where the execution debtor has interfered with the sale he cannot sue the sheriff, although *quoad* creditors the sheriff is not relieved from responsibility. Here the negligent acts cannot be separated. The negligence in the conduct of the sale was the result of the previous interference of the execution

(*a*) 6 B. & C. 739. (*b*) 8 T. R. 505.

debtor. Less interference by the execution creditor would have discharged the sheriff: *Ford* v. *Leche* (*a*). An execution debtor may, in some respects, place himself in the same position as an execution creditor. For instance, either may rule the sheriff to return the writ; and as the interference of the creditor would have made the officer his agent, and have precluded him from ruling the sheriff to return the writ: *Porter* v. *Viner* (*b*), in like manner the interference of the debtor would prevent him from suing the sheriff. Secondly, the debtor being disentitled to sue the sheriff, the Bankruptcy Act, 1861, does not place his assignee in a better position.

MARTIN, B.—I am of opinion that the rule ought to be discharged. There was no contract so as to render the officer the agent of the execution debtor. Possibly the sheriff may be relieved from responsibility to the extent to which the debtor interfered by requesting a postponement of the advertisements; but there is no evidence that he interfered with the sale so as to relieve the sheriff from his ordinary duty of obtaining the best price he could for the goods.

BRAMWELL, B.—In my opinion the defendant fails on the facts. I think we cannot come to the conclusion that there was an agreement between the execution debtor and the officer which superseded the authority under the writ. It seems to me that there was only a modification of the authority, and that it was nothing more than if the debtor had said, "I will not charge you with any consequences which may arise if you will postpone the advertisement of the sale." But, after all, the sale was under the writ, and

(*a*) 6 A. & E. 699. (*b*) 1 Chit. Rep. 613, note.

1866.
WRIGHT v. CHILD.

with the same power as the officer had before the debtor interfered.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. I agree with my brother *Martin* that there was no evidence of any contract by which the sheriff was discharged. There may have been a modification of the officer's authority, which would relieve the sheriff from responsibility as to acts or omissions to which the modification applied, but no further; and the sheriff is still liable for negligence in the conduct of the sale.

Rule discharged.

June 12.

MARY BICKFORD *v.* D'ARCY AND BEACHEY.

It is no objection to the delivery of interrogatories under the 51st section of the Common Law Procedure Act, 1854, that the answers would criminate the party interrogated, but he may on that ground refuse to answer them.

Where, however, it appears that interrogatories are not put bonâ fide, but with some sinister object, the Court will, in the exercise of its discretion, disallow them.

In an action charging the defendants, as a partnership firm of attornies, with negligence in investing the plaintiff's money, one of the defendants, who was not an attorney, objected to the delivery of interrogatories to him for the purpose of ascertaining whether he was a partner in the firm, inasmuch as the answers might render him criminally liable under the 6 & 7 Vict. c. 73, s. 2.—*Held*, that the interrogatories ought to be administered, and that the defendant might safely answer them, since the alleged negligence may have occurred in the business of the firm as scriveners, not as attornies.

THIS was a rule calling on the plaintiff to shew cause why an order of *Pigott*, B., that the plaintiff be at liberty to deliver to the defendant Beachey interrogatories in writing under the 51st section of the Common Law Procedure Act, 1854, should not be rescinded.

The first count of the declaration stated, that in consideration that the plaintiff retained and employed the defendants as her attornies and solicitors, for reward to them in that behalf, to invest certain monies for the plaintiff on mortgage in a proper manner, the defendants

mised the plaintiff so to invest the said monies; and defendants, in pursuance of such retainer and employnt, then received the said monies of and from the intiff to invest the same on mortgage in a proper nner; but the defendants did not invest the same ough a reasonable time in that behalf elapsed before suit, whereby the same had become wholly lost to the intiff.

The defendants pleaded: first, that they did not promise alleged: secondly, that they did not, in pursuance of alleged retainer and employment, receive the said nies for the purpose and on the terms alleged.—Issues reon.

The interrogatories were as follows:—

. Did you during the year 1847, and during the succeeding years rn to July, 1865, or during any and which of such years, receive and what share of the profits made in those years respectively he business of attornies and solicitors carried on by the firm of Arcy and Beachey, at Newton Abbott, Devonshire?

. Was the amount of profits which you were to receive or did eive during any and which of those years regulated or fixed by verbal agreement or agreements, and, if so, of what date or dates, ween you and some and what other person or persons or otherwise, how otherwise?

. How often during those years were the said profits divided, and and is the division of those profits evidenced by any and what k or writing; and how much did you receive during each of those rs as your share of the profits, and with whom respectively did share those profits?

. In the year 1855, and during the succeeding years down to July 5, or during any and which of such years, were books of profits de by the said firm of D'Arcy & Beachey, or by John Francis Arcy, kept in duplicate in your or any other person's, and, if so, whose handwriting; and were such books of division of profits de up monthly, or at any other and what periods, and were ch books, or either of them, ever, and if so when, signed by you d the said W. F. D'Arcy, or either of you, and was one copy of

1866.
BICKFORD v. D'ARCY.

such books kept by the said W. F. D'Arcy and the other by you, and if so, when and during what period?

5. Did you, in the year 1857, and during the succeeding years down to July, 1865, or during any and which of such years, attest the signature and execution of various deeds and documents prepared by the said firm of D'Arcy & Beachey?

6. Did you, in the year 1857, and during the succeeding years down to July, 1865, or during any and which of such years, cause or allow your name to be inserted as a trustee for sale in various mortgage securities and other documents prepared by the said firm of D'Arcy & Beachey?

7. Did you during any and which of the years referred to in the preceding interrogatories make out bills of costs in the name of D'Arcy & Beachey, and send the same in to the clients of that firm?

8. Did you personally during the same period receive the amounts of any such bills of costs, and lend money, and to what amount?

9. Did you during the same period draw cheques in respect of any matters transacted by the said firm for their clients?

10. Did you during the same period confer with any clients of the said firm upon matters of business transacted by such clients with the said firm; and did you from time to time make any and what charges for such conferences or for attendance upon such clients in respect of such business; and are there any entries, and in what books, relating to such conferences, attendances and charges?

11. Did the said firm of D'Arcy & Beachey, in the year 1858, or at any other and if so what period, receive from the plaintiff the sum of 850*l.*, or any other and what amount, to be invested upon mortgage security; and upon what security was such money invested; and has the money so invested, or any part thereof, been paid off to or received by the said firm of D'Arcy & Beachey, or by the said W. F. D'Arcy, or by you, and if so when and by whom was such payment made, and was any transfer of such security made and executed, and if so to whom; and have you in your possession or control the draft of the said security and of the transfer thereof, and if not in whose custody or control are the same?

12. If the said sum of 850*l.*, or any part thereof, was paid, was the same invested by the said firm upon any and what security?

13. Were you previously to the month of June, 1864, in receipt of one third part or share, or of any other part or share, of the profits of the business of the said firm of D'Arcy & Beachey; and did you, in or about the month of June, 1864, or at any other and what period,

pay to the said defendant W. F. D'Arcy, the sum of 500*l.* or any other and what sum, as the purchase money for a further portion of the said profits: and did you from thenceforth or from any other and what period, until the 1st January, 1845, either on your own behalf or on behalf of any other and what person, receive one half part of the aforesaid profits, or any other and what greater share of the same profits than you had previously received?

14. Did you, in the month of January, 1845, or at any other and what time, sell one third part or share, or any other part or share, of the aforesaid business to the said W. F. D'Arcy, or to Mr. John Hooper, of Newton Abbott, Devonshire, solicitor, or to any other person; and did you thereupon receive from the said W. F. D'Arcy, or from the said J. Hooper, or any other person, the sum of 500*l.*, or any other sum, as the purchase money thereof or in anywise in relation thereto; or was any and what security for such last mentioned sum of 500*l.*, or any other sum, given to you by any and what person?

15. Have you now, or had you lately, and when last in your possession, custody or power, or in the possession, custody or power, of your solicitors or solicitor, agents or agent, any and what books of account, ledgers, day books, cash books, letter books, receipts, costs books, drafts, memoranda or other papers or writings relating to the matter hereinbefore interrogated upon, or to the matter in question in this action?

The affidavit of the defendant Beachey stated that the defendant D'Arcy was an attorney and solicitor at Newton Abbott, Devonshire, and was formerly in partnership with John Beachey the younger, since deceased, under the style of "D'Arcy & Beachey," and that after his death the defendant D'Arcy continued the business under the same style of "D'Arcy & Beachey:" that the defendant Beachey is not and never was an attorney or solicitor: that he is not and never was partner with defendant D'Arcy, and never held himself out to plaintiff or any one else as being a partner: that he was not privy to the receipt by the defendant D'Arcy of the money for the recovery of which this action is brought, and that he never received any part of it.

1866.
BICKFORD v. D'ARCY.

The affidavits on the part of the plaintiff stated that the cause of action accrued after the death of the son of the defendant Beachey; and that, by an agreement entered into between the defendants, and signed by the defendant Beachey, it was recited as follows:—"Whereas the said W. F. D'Arcy carries on the business of an attorney at law and solicitor in Newton Abbott aforesaid under the firm of D'Arcy & Beachey, his late partner, John Beachey, Junr., having died in the month of June, 1866, since which time he has carried it on in conjunction with and assisted by the said John Beachey, the father of his late partner:" that after the death of the son of the defendant Beachey, the defendants D'Arcy & Beachey (although the defendant Beachey was not admitted an attorney) carried on, at the time the cause of action accrued to the plaintiff, the profession of attornies and solicitors.

Coleridge and *H. T. Cole* shewed cause.—The power under the 51st section of the Common Law Procedure Act, 1854, to deliver interrogatories is not simply co-extensive with the jurisdiction of Courts of equity to grant a discovery, but extends to "any matter as to which discovery may be sought." The principle on which the Courts act in these cases is, that it is immaterial what is the character of the question provided the answer would not tend to criminate the party interrogated. If it would not, he is equally bound to answer it as a witness in Court. If it would, he may object; but he must state the reason for his objection, and the Court will then determine whether the answer would tend to criminate him: *Regina* v. *Garbett* (a). [*Pollock*, C. B., referred to the judgment of Lord *Eldon*, C., in *Ex parte Cossens* (b).] The true view is not that the questions are inadmissible because not constat that the

(a) 1 Den. C. C. 236. (b) 1 Buck. 531.

witness will object to answer them, but that, if the answers would tend to criminate him, he must claim the protection of the Court. In *Bartlett* v. *Lewis* (a) the Court of Common Pleas recognised and adopted the law as laid down by this Court in *Osborn* v. *The London Dock Company* (b), and held that it was no objection to the interrogatories that the answers, if given in the affirmative, would render the party interrogated liable to a criminal prosecution, though it might be ground for refusing to answer. In *Tupling* v. *Ward* (c), this Court, in the exercise of its discretion, considered that the interrogatories ought not to be administered. In *Stern* v. *Sevastopulo* (d), which was an action for slander, the interrogatories were disallowed on account of the nature of the action and the absence of any special circumstances to warrant them. Here there is no reason why the interrogatories should not be allowed, even though the answers might subject the party interrogated to an indictment for misdemeanor: *Regina* v. *Buchanan* (e). [*Martin*, B.—At Chambers I have acted upon the authority of *Osborn* v. *The London Dock Company* (b) and *Bartlett* v. *Lewis* (a), but where it appeared that the questions were not put bonâ fide, but for the purpose of compelling the party interrogated to answer disagreeable questions, I have refused to allow them. Here there are no questions which would be objectionable in the case of an ordinary partnership.] The answers would not necessarily tend to criminate.

Karslake and *Wills*, in support of the rule.—The defendant whom it is sought to interrogate never was an attorney; but the declaration charges him with misconduct when employed as an attorney, and he

(a) 12 C. B. N. S. 249.
(b) 10 Exch. 698.
(c) 6 H. & N. 749.
(d) 14 C. B. N. S. 737.
(e) 8 Q. B. 883.

1866.
BICKFORD v. D'ARCY.

could not answer these interrogatories without admitting that he acted as an attorney. By the 6 & 7 Vict. c. 73, s. 2, any person who shall act as an attorney without being duly qualified is liable to be indicted for a misdemeanor notwithstanding penalties are imposed by other sections: *Regina* v. *Buchanan* (*a*). It is not the practice in this Court to administer the interrogatories and leave the party to object to answer them: *Baker* v. *Lane* (*b*), *Taplin* v. *Ward* (*c*). [*Channell*, B.—*Baker* v. *Lane* stands on its own footing. There the interrogatories were not bonâ fide for the purpose of obtaining information in the action, but with the ulterior object of shewing that the party interrogated had committed a criminal offence.] This is a fishing application with the view of obtaining some admission which would subject the party to criminal proceedings. [*Martin*, B.—The interrogatories seem to me bonâ fide for the purpose of ascertaining whether the party interrogated was a partner with the other defendant. *Pollock*, C. B.—The declaration alleges that the plaintiff employed the defendants as her attornies, but it may turn out that she only employed them to invest her money. There is nothing in the 6 & 7 Vict. c. 73 to prevent a person from carrying on business as a scrivener with an attorney as his partner. *Channell*, B.—To support the declaration I doubt whether it would be necessary to prove that the defendants were attornies or solicitors. *Martin*, B.—Attornies are constantly employed to invest money, but not in their character as attornies.] Here the party is interrogated as to the share he had in the profits of the firm *as attornies*. Even where criminal proceedings could not be taken, the Courts have been cautious in the exercise of their discretion,

(*a*) 8 Q. B. 883. (*b*) 3 H. & C. 544.
(*c*) 6 H. & N. 749.

and have disallowed interrogatories where the answer might subject the party to a forfeiture: *Pye* v. *Butterfield* (a). [*Pollock*, C. B.—That arises from the principle of the law of evidence, that a witness cannot be compelled to answer a question where the answer might create a forfeiture of his estate.] Moreover, this is an attempt to extract from a clerk the secrets of the firm, which he is bound not to disclose.

POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. In *Baker* v. *Lane* this Court decided that the interrogatories ought not to be allowed; and it is stated that the objection was that some of them tended to show that the defendant had committed a criminal offence. That, however, was not the true ground of our decision. The judgment is merely a short expression of opinion, and the real ground of the decision was that discussed amongst ourselves, viz., that the interrogatories were not bonâ fide. I believe that these interrogatories are bonâ fide, and for the purpose of obtaining answers relevant to the suit. For myself I should have preferred making a broad distinction between what may be called an examination in chief and a cross-examination. These interrogatories are not in the nature of a cross-examination. I agree with the other members of the Court that in general interrogatories of this character ought to be allowed; but I think it would have been better if the distinction I have pointed out had originally been made, and that if the questions obviously tended to criminate they should not be allowed.

MARTIN, B.—I am of the same opinion. The correct rule is that stated by the plaintiff's counsel, namely, that

(a) 5 B. & S. 829.

1866.
BICKFORD v. D'ARCY.

the objection must be taken by the witness when he is called upon to answer the interrogatories. Sir *J. Wigram*, in his Points in the Law of Discovery (*a*), says: "If a question involves a criminal charge, *the plaintiff is not entitled* to an answer to such question, however material it may be to the *plaintiff's case.*" So that he lays down, not that the question is not to be put, but that the party putting is not entitled to an answer.

Soon after the 17 & 18 Vict. c. 125 passed the case of *Osborn* v. *The London Dock Company* (*b*) came before this Court; and *Alderson*, B., who had great experience in equity matters, and the present Lord *Wensleydale*, adopted the view of Sir *J. Wigram*; and in the subsequent case of *Bartlett* v. *Lewis* (*c*) the same view was adopted by the Court of Common Pleas. I have acted on the same principle at Chambers, but I have frequently disallowed interrogatories where I thought that the questions were not bonâ fide put; for I would not allow a party to be interrogated for the purpose of placing him in a disagreeable position.

In the case of *Baker* v. *Lane* (*d*) there was a further object in the interrogatories than merely getting an answer in the suit. Here the question is, whether the defendant Beachey is jointly liable with D'Arcy for the alleged negligence in investing the plaintiff's money. I do not see a single question which is objectionable; and I think that they are put bonâ fide and with the object of obtaining answers which the plaintiff is entitled to have. The question is whether the defendant Beachey was a partner as a scrivener, not as an attorney; and I think he may answer these interrogatories without subjecting himself to any penalty whatever. For these reasons I think that the rule ought to be discharged.

(*a*) Page 80, sect. 130, 2nd ed.
(*b*) 10 Exch. 698.
(*c*) 12 C. B. N. S. 249.
(*d*) 3 H. & C. 544.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. If I thought that these interrogatories were propounded with an improper object, and not to serve the purposes of the suit, I should come to a different conclusion. But in my opinion the object is to shew that the firm of D'Arcy & Beachey was entrusted with the investment of the plaintiff's money, and that the defendant Beachey was a partner in that firm, and therefore responsible in his own person for the negligence of the firm. The reference to the business carried on by the firm as attornies does not shew that these interrogatories are propounded with an indirect object: for the business of a scrivener, in which it is sought to make the defendant Beachey a partner, is not necessarily incident to that of an attorney, although it is frequently carried on with it: and the questions as to whether Beachey was in partnership with D'Arcy, who is an attorney, are put for the purpose of shewing that Beachey is responsible as one of the partners in the firm entrusted with the investment of the plaintiff's money.

The cases of *Osborn* v. *The London Dock Company* and *Bartlett* v. *Lewis* are authorities in favour of the plaintiff. Looking at the particular circumstances of the case of *Baker* v. *Lane*, I do not think that the decision in that case interferes with the fair inference to be drawn from *Osborn* v. *The London Dock Company* or *Bartlett* v. *Lewis*.

For these reasons I am of opinion that this application ought to be discharged: but I confess I wish some clear rule could be laid down on satisfactory grounds. I think that these interrogatories may be propounded, and if the party declines to answer them we shall have, at some future time, to see whether the excuse which he may allege is sufficient to relieve him from the obligation of answering.

Rule discharged.

1866.

May 24.

O'Brien *v.* Brodie.

Where an execution is levied by seizure of the goods of the debtor, and afterwards an interpleader order is made by which the execution is delayed, and before its completion by sale of the goods the debtor is adjudged a bankrupt, the execution creditor is, by the 184th section of the Bankrupt Law Consolidation Act, 1849, entitled to no more than a rateable part of his debt.

THE plaintiff in this action having recovered judgment against the defendant, on the 20th December 1865 issued a writ of fieri facias, directed to the sheriff of Surrey, to levy 182*l.* 13*s.* and interest, under which the sheriff, on the same day, levied on goods in the possession of the defendant on his premises at Lambeth. Thereupon one Harriett Lloyd claimed the goods under a bill of sale. The sheriff then took out an interpleader summons, and on the 23rd December *Lush*, J., made an order "that on payment of 200*l.* into Court by the claimant within seven days from the date of the order, or on her giving within the same time security to the satisfaction of one of the Masters of the Court for payment of the same amount according to the direction of any rule of the Court or Judge's order to be made herein, and on payment of the possession money to the sheriff, that the sheriff do withdraw from the possession of the goods and chattels seized by him under the writ of fieri facias issued herein. And further that unless such payment be made or security given within the time aforesaid the sheriff do proceed to sell and pay the proceeds of the said sale, after deducting the expenses thereof and the possession money from this date, into Court in the cause to abide further order. And further that the parties do proceed to the trial of an issue in the Court of Exchequer, in which the claimant shall be plaintiff and the execution creditor defendant, and that the question shall be whether, at the time of the seizure by the sheriff, the goods were the property of the claimant as against the execution creditor," &c.

On the 30th December the defendant was adjudicated a bankrupt on his own petition, and notice of the adjudication, and that the goods were claimed by the official assignee, was given to the sheriff. The claimant did not comply with the terms of the order of *Lush*, J.

On the 1st January, 1866, the sheriff served the plaintiff and the official assignee with an interpleader summons, which was heard on the 4th January before *Martin*, B., who made an order barring the claim of the official assignee. On the 10th January the sheriff sold the goods by auction, and after deducting his expenses, &c., paid the balance, 51*l.* 6*s.*, into Court, pursuant to the order of the 23rd December.

On the 20th January the creditors' assignee was appointed. The plaintiff afterwards took out a summons for payment out of Court to him of the 51*l.* 6*s.*, on the ground that the claimant had failed to comply with the interpleader order of the 23rd December. After some further proceedings (immaterial to the present question) *Martin*, B., made an order accordingly, and, upon a summons to rescind that order and pay the money to the assignee, referred the matter to the Court.

Hannen now moved for a rule calling on the plaintiff to shew cause why the order of *Martin*, B., should not be rescinded, and why the sum of 51*l.* 6*s.* paid into Court under the order of *Lush*, J., should not be paid to the creditors' assignee.—The question is, whether, in the event of an execution being levied by seizure, but in consequence of an interpleader order not perfected by sale of the goods before an adjudication in bankruptcy, the execution creditor or the assignee is entitled to the proceeds. That depends on the 184th (*a*) section of the Bankrupt Law Consolidation

(*a*) Sect. 184.—"That no creditor having security for his debt, or having made any attachment in London, or in any other place,

1866.
O'BRIEN
v.
BRODIE.

Act, 1849 (12 & 13 Vict. c. 106), taken in connection with the 133rd section (*a*). By the 184th section, no creditor by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure and sale upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the date of the fiat or the filing of a petition for adjudication of bankruptcy: Provided always, that nothing herein contained shall be deemed to give validity to any warrant of attorney, cognovit or consent to a Judge's order declared to be null and void by any provision of this Act, nor to give validity to any judgment entered up under or by virtue of any such warrant of attorney or consent, or to any execution or extent executed or levied under or by virtue of any such warrant of attorney, cognovit or consent."

(*a*) Sect. 133.—"That all payments really and bonâ fide made by any bankrupt, or by any person on his behalf, before the date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and bonâ fide made to any bankrupt before the date of the fiat or the filing of such petition, and all conveyances by any bankrupt bonâ fide made and executed before the date of the fiat or the filing of such petition, and all contracts, dealings, and transactions by and with any bankrupt really and bonâ fide made and entered into before the date of the fiat or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt bonâ fide executed by seizure and all executions and attachments against the goods and chattels of any bankrupt bonâ fide executed and levied by seizure and sale, before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not, at the time of such payment, conveyance, contract, dealing or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed: Provided that nothing herein contained shall be deemed or taken to give validity to any payment or to any delivery or transfer of any goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judg-

ing security for his debt shall receive upon any such rity more than a rateable part of such debt, except in ect of any execution levied by seizure and sale before filing of a petition for adjudication in bankruptcy. By . 133 (*a*) all executions against the goods and chattels my bankrupt bonâ fide executed and levied by seizure sale before the filing of such petition shall be deemed be valid notwithstanding any prior act of bankruptcy, vided the person at whose suit the execution issued not, at the time of levying such execution, notice of prior act of bankruptcy. The plaintiff was a creditor ing security for his debt within the meaning of the th section; and by the 133rd he would not be entitled riority unless the execution was levied by seizure *and*

Here there has been no sale under the execution, and 184th section does not contain any exception in the case e sale being prevented by an order of the Court or a Judge. e sheriff wrongfully delayed the sale there might be a dy against him. But here the execution was suspended der to investigate the claim of a person who for aught appeared had a good title. *Hutton* v. *Cooper* (*b*) entical with this case, except that there the execution not delayed by an interpleader order. [*Channell*, B.— re money has been paid into Court and the defendant become bankrupt before verdict, the plaintiff is not a itor having security for his debt within the 184th sec- : *Murray* v. *Arnold* (*c*).] There the money was not in as a security for an admitted debt, but to abide the t of the suit. [*Bramwell*, B., referred to *Edwards* v. *sbrook* (*d*).] There the execution had been levied by

on a warrant of attorney or wit actionem or Judge's obtained by consent given y bankrupt by way of fraut preference."

(*a*) *Ante*, pp. 546-7.
(*b*) 6 Exch. 159.
(*c*) 3 B. & S. 287.
(*d*) 3 B. & S. 280

1866.
O'Brien v. Brodie.

seizure *and sale* before the filing of the petition for adjudication in bankruptcy. If the execution had not been perfected by sale it would not have been valid as against the assignees: *Young* v. *Roebuck* (*a*).

The Court having granted a rule nisi,

Holl shewed cause in the first instance.—First, it is conceded that if there had been no Judge's order, the case would have fallen within the 184th section of the Bankrupt Law Consolidation Act, 1849. The 133rd section has no application, because there was no act of bankruptcy prior to the levy by seizure. Neither is the case within the 73rd section (*b*) of the Bankruptcy Act, 1861, because the adjudication in bankruptcy was founded on the debtor's petition, not on the execution. No doubt, where bankruptcy intervenes before the execution is perfected by *sale* the goods pass to the assignees: *Hutton* v. *Cooper* (*c*), *Young* v. *Roebuck* (*a*). The 184th section of the Bankrupt Law

(*a*) 2 H. & C. 296.

(*b*) Sect. 73.—"If any execution shall be levied by seizure and sale of any of the goods and chattels of any trader debtor, upon any judgment recovered in any action personal for the recovery of any debt or money demand exceeding fifty pounds, every such debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure of such goods and chattels: Provided always that unless in the meantime a petition for adjudication of bankruptcy against the debtor be presented, the sheriff or other officer making the levy shall proceed with the execution, and shall at the end of seven days after the sale pay over the proceeds, or so much as ought to be paid, to the execution creditor, who shall be entitled thereto notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money so received by the creditor shall be paid by him to the assignee under the bankruptcy, but the sheriff or other officer shall not incur any liability by reason of anything done by him as aforesaid: Provided also that in case of bankruptcy the costs and expenses of such action and execution shall be retained and paid out of the proceeds of the sale, and the balance only, after such payment, be paid to the assignees."

(*c*) 6 Exch. 159.

Consolidation Act was only intended to apply to common law executions, and to give the assignees a benefit where a creditor holding security was guilty of laches. Before the Bankruptcy Act, 1861, it was usual for the sheriff to assign the goods to the execution creditor, but now he is bound to sell them by auction where the judgment debt exceeds 50*l.*: sect. 74. By the 184th section, if a creditor having security allows an execution to be incomplete, and bankruptcy intervenes, he loses the benefit of his security. But here the Judge's order took the goods out of the control of the sheriff, and prevented the creditor from pressing on the sale, and the sheriff from selling. The goods were no longer in the possession of the sheriff under a common law execution, but subject to the orders of the Court in an equitable proceeding: *Parsons* v. *Lloyd* (*a*).—Secondly,

---

(*a*) Ex relatione HOLL.

PARSONS *v.* LLOYD.

GOODS seized by the sheriff of Surrey under a writ of fi. fa. were claimed by a mortgagee. The sheriff interpleaded, and *Martin*, B., ordered a sale of the goods, and that the proceeds, after deducting the amount of the mortgagee's claim should be paid to the execution creditor, to the amount of his debt. The sheriff sold under the order. The debtor afterwards became bankrupt, and his assignees claimed the proceeds. The sheriff called on the assignees and execution creditor to interplead, and the parties agreed to abide by the opinion of *Bramwell*, B.

BRAMWELL, B.—Though (as there is no appeal) my reasons are unimportant, I wish the parties to see that I have duly considered the matter.

The execution creditor would be entitled, notwithstanding the bankruptcy, but for some special provision in the Bankruptcy Acts, because the assignee succeeded to the rights of the bankrupt as he possessed them, which were subject to the execution.

Then is there any such special provision? I think not. I think section 184 does not apply. The goods were not subject to a common law execution which that section deals with.

The Common Law Procedure Act, 1860, gives the execution cre-

1866.
O'Brien v. Brodie.

the plaintiff was no longer a creditor having security for his debt within the meaning of the 184th section. [*Martin*, B.—Suppose the claimant had paid the 200*l.* into Court, and the sheriff had withdrawn; and it turned out that the goods, in fact, belonged to the bankrupt and not to the claimant, would not the execution creditor have been entitled to the 200*l.*?] The moment the sheriff was prevented by the Judge's order from proceeding with the execution in the ordinary course of law the case was taken out of the 184th section, and it is immaterial whether the 200*l.* was paid into Court or not. The execution ceased to be a security in the hands of the creditor when the Judge took upon himself the power of dealing with it. The order was equivalent to a prohibition against selling, and the sheriff would have been guilty of a contempt of Court if he had acted in violation of it. [*Bramwell*, B.—The order is for the benefit of the claimant, and it seems to me that it would be no violation of it if the sheriff sold in the meanwhile, although he might subject himself to an action.] Here, while the creditor was sui juris and had a lien on the goods, an order was made which deprived him of his security, and the goods became clogged with a trust.—He referred to the judgment of *Blackburn*, J., in *Murray* v. *Arnold* (*a*).

Hannen, in support of the rule.—The 133rd section of the Bankrupt Law Consolidation Act has some bearing on the case, though it mainly turns on the 184th section. If

ditor a lien right in respect of which there is no special provision in the Bankruptcy Acts, unless it be the one in sect. 184 as to liens. In this case the defendant might have given a second mortgage on these goods, which would have been perfectly valid. He did not, but *Martin*, B., by his order, having full power, did. In short, the execution, as such, was at an end by this order, and the plaintiffs had a lien as security by other means, valid against a subsequent bankruptcy.

(*a*) 3 B. & S. 287.

e execution creditor had seized *and sold* before the filing the petition for adjudication of bankruptcy, without tice of any prior act of bankruptcy, the execution would ve been valid. But here there has been no sale; and less the 184th section is qualified by introducing the rds "provided he is not, by act of the law, prevented m completing the execution by sale," the condition by ich a creditor having security has priority over the ers has not been complied with. Assuming that the imant had a right to the goods as against the execution btor, yet having been left in his order and disposition, on his bankruptcy they vested in his assignees. If the ods had been sold on the 23rd December, and the money id over to the plaintiff, the assignees would, under the rd section of the Bankruptcy Act, 1861, have been titled to recover it back, since the execution debtor was judicated a bankrupt within fourteen days from the day the sale. Notwithstanding the interpleader order, the e was under the authority of the writ. The order rely suspended the execution, and did not confer any w power to sell the goods. In *Parsons* v. *Lloyd* (*a*) the ds were sold and the execution perfected before the ikruptcy, so that the 184th section did not apply.

POLLOCK, C. B.—I am of opinion that the rule ought be absolute. I think that if the legislature had contemted a case of this kind they would have provided for it. t having done so, we should be legislating instead of rpreting the act of parliament if we held that the gnees were not entitled to this money. Taking the guage of the 184th section as it stands, the plain result that where the goods of a debtor are seized under a

(*a*) *Ante*, pp. 549-50.

1866.
O'Brien
v.
Brodie.

writ of execution, it is of no avail to the creditor in the event of a petition for adjudication in bankruptcy being filed before the levy is perfected by sale of the goods. Very specious and indeed just and equitable grounds have been suggested why we should hold that the 184th section does not apply to this case; but I cannot so construe that enactment. I think that its meaning is, that a seizure by a sheriff not followed by a sale shall not, in the event of bankruptcy, prevail against the title of the assignees. Here there was a seizure of the goods by the sheriff, but no sale took place until after an adjudication in bankruptcy, in consequence of the interpleader order having delayed the execution. No doubt, it was never intended that the interpleader order should have that effect, and probably, in future, Judges will not postpone the completion of the execution, but leave the sheriff to sell, in order, as far as possible, not to prejudice the rights of the execution creditor. I feel the force of the argument for the plaintiffs, and should be glad to do what is equitable; but the language of the act of parliament is too strong to bear the construction contended for, and as there was no sale before the bankruptcy, the execution creditor is not entitled to more than a rateable part of his debt, and the rule must be absolute.

Martin, B.—I am of the same opinion. If I were to put a construction on the Interpleader Act (1 & 2 Wm. 4, c. 58) and the 184th section of the Bankrupt Law Consolidation Act, 1849, I should be inclined to agree with Mr. *Holl*, and to hold that the interpleader order took the case out of the 184th section, and that the execution creditor had no longer a security for his debt within the true meaning of that section, the goods being in fact in custodia legis. But looking at the 73rd section of the Bankruptcy Act, 1861,

'the Judge who made the interpleader order had done hat is suggested, and had directed the sheriff to proceed ith the sale, the assignees would nevertheless have been ntitled to the proceeds, inasmuch as the debtor was adjuicated a bankrupt within fourteen days from the day of le. Reading the two sections together, I think it was e intention of the legislature that in the event which as occurred in this case the general body of creditors ould have the proceeds of the sale. We can only dminister the law as we find it without regard to its olicy; and, as the result of these two sections is that e assignee is entitled to the money, the rule must be bsolute.

BRAMWELL, B.—I am of the same opinion. The statute 12 & 13 Vict. c. 106, s. 184) says, in substance, that no xecution creditor shall receive upon his execution more an a rateable part of his debt, except in respect of an xecution levied by seizure and sale before petition for djudication in bankruptcy. Now if the execution creditor eceives this money he will receive more than a rateable art of his debt, and the question therefore is whether he ill receive it in respect of an execution. For, if so, inasuch as that execution had not been levied by seizure *and le* before the filing of the petition for adjudication, the se is within section 184. But he certainly will, if he eceives this money, receive it by virtue of an execution. ur judgment must therefore be against him. I do not nderstand this to be inconsistent with the case decided by e at Chambers (*a*).

CHANNELL, B.—The question now raised is one of conderable importance, and I regret that we have to decide

(*a*) *Parsons* v. *Lloyd*, *ante*, pp. 549-50.

1866.
O'Brien
v.
Brodie.

it on motion from which there is no appeal. The case turns principally on the construction of the 184th section of the Bankrupt Law Consolidation Act, 1849, though some light is thrown upon it by the 133rd section. The words of the 184th section are extremely strong, and if no interpleader order had intervened there could have been no doubt that the execution creditor was a creditor having security for his debt, and that, having levied by seizure but not sold before the petition for adjudication of bankruptcy, he was not entitled to more than a rateable part of his debt. But it is argued that the interpleader order has taken the case out of the 184th section, and that when the Judge interfered with the right of the execution creditor to direct the sheriff to sell the goods, and the authority of the sheriff under the writ to sell them, the execution creditor ceased to be a creditor having security for his debt within the meaning of the 184th section. I cannot put that construction on the section. Looking at its language, I think that, notwithstanding the interpleader order, the execution creditor remained a creditor having security for his debt, and consequently the rights of the assignee must prevail. This view is fortified by the 73rd section of the Bankruptcy Act, 1861, and by the course of legislation, the tendency of which is to effect an equal distribution of the bankrupt's property among his creditors. For these reasons I think that the rule ought to be absolute.

Rule absolute.

1866.

RYALLS *v.* LEADER and Others.

May 26.

The examination of a prisoner in gaol by a registrar of the Court of Bankruptcy under the 101st section of the Bankruptcy Act, 1861, is a judicial proceeding in a public Court; and no action will lie for the publication of defamatory matter contained in a fair and bonâ fide report of such proceedings.

LIBEL.—The declaration stated that the defendants falsely and maliciously published of and concerning the plaintiff, in a newspaper called the "Sheffield and Rotherham Independent" the words following, that is to say: "Proceedings in bankruptcy. York Castle, Saturday, Dec. 16. Before P. B. Welch, Esq., Registrar. Frederick George Gray, of Sheffield, common brewer, stated that Mr. John Holmes, Mr. George Exley and Mr. James Ramsden, bill discounters, Leeds, were his judgment creditors, and he owed them 51*l.* 14*s.* 6*d.* debt and costs. He was arrested on the 11th March. The debt was incurred in discounting a bill, and his entire liabilities amounted to about 5300*l.* His assets were a brewery and plant and public house called the "Free Trade Vaults," in Scotland Street, the value of which was 1810*l.*, but there was a mortgage upon the property of 800*l.* He had a lease of the brewery, ninety-four years of which were unexpired: had been in business twelve years; never accepted any accommodation bills or entered into any business except that of brewing. Bad debts and losses in trade were the cause of his insolvency. He was in partnership with Mr. John Ryalls" (thereby meaning the plaintiff), "a solicitor, who" (thereby meaning the plaintiff) "had compounded with his creditors, and Mr. C. H. Belcher. He" (Gray) "fulfilled the duties of book-keeper and traveller in connection with the brewery, and he only drew 30*s.* per week for his services. The brewery was carried on under the name of F. Gray & Co. (Limited), and it was now temporarily closed. He believed that Mr. Ryalls" (meaning

1866.
RYALLS v. LEADER.

thereby the plaintiff) "had been in possession of the brewery since he" (Gray) "had been in York Castle. The debts due to the firm were about 400*l.* Gray was adjudicated a bankrupt, and was discharged with protection until the 28th inst., when he will have to appear in the Sheffield Court of Bankruptcy" (the defendant thereby meaning that the plaintiff had been compelled to compromise and had compromised with his creditors; and had requested and induced his creditors to take less sums of money in discharge of their claims than were actually due and owing to the said creditors of the plaintiff): Whereby he was greatly injured in his credit and reputation.

Plea: not guilty.

At the trial, before *Keating*, J., at the last Leeds Spring Assizes, the plaintiff having proved the publication of the libel set out in the declaration, and also that the defamatory matter was false in fact, the defendants' counsel submitted that the action could not be maintained, inasmuch as the publication was a bonâ fide report of judicial proceedings in a public Court (*a*).

The learned Judge told the jury that if they thought that the report was a fair report of the proceedings before the registrar in bankruptcy, and was published without malice, it was a privileged communication, and the defendants were entitled to a verdict. The jury having found a verdict for the defendants,

Manisty, in last Easter Term, obtained a rule nisi for a new trial on the ground of misdirection; against which

Overend and *Cave* now shewed cause.—This publication was privileged, inasmuch as it was a fair and correct report of a judicial proceeding in a public Court. First, this was

(*a*) See the 100th and 101st sections of the Bankruptcy Act, 1861, *post*, p. 557.

a judicial proceeding. The 100th section (*a*) of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), requires the

(*a*) Sect. 100.—The gaoler of every prison in England or Wales, within the walls, rules, or liberties whereof any person shall be in custody upon any process whatsoever, for or by reason of any debt, claim, or demand whatsoever, shall on the first day of every month, or if such day shall happen to be Sunday then on the day next following, make a return under his hand of the name of every such person, and the date of his or her imprisonment, and the nature and amount of the debt or demand, debts or demands, for which he or she is imprisoned or in custody, and whether he or she is willing or refuses to petition the Court of Bankruptcy, or is unable to do so by reason of poverty, or in such other form and manner and with such particulars as any general orders shall direct. Such return shall also include the names and addresses of every creditor at whose suit each such prisoner is imprisoned or detained, and shall be made by gaolers of prisons situate within the London district to the London Court, and by the gaolers of prisons within the country districts to the district Court of Bankruptcy, or the County Court having jurisdiction in bankruptcy, within the jurisdiction of which the gaol is situate, as the case may be."

Sect. 101.—"The Commissioner or County Court judge, as the case may be, shall in every case, on receiving such return, make an order that a registrar of the Court of Bankruptcy or of the County Court of the district in which the gaol is situate, shall attend at the gaol on a day to be named, being at least seven and not more than twenty-one days from the date of such return. Notice of such order shall be forthwith given to the gaoler and also to the execution and detaining creditors of every prisoner included in such return. On the day named in the order the registrar shall attend at the prison and examine every prisoner included in such return who shall have been in prison, being a trader, for fourteen days, or, not being a trader, for two calendar months, touching his estate and effects, debts, dealings and transactions. The registrar shall also ascertain the last place of abode and business of each such prisoner within the six months next prior to his imprisonment. The registrar shall have power to make an order of adjudication in bankruptcy against every such prisoner, and to grant him protection and to make an order for his release from prison, and shall also direct in what Court such adjudication shall be prosecuted, having regard to the amount of debts and the place of trade or residence of the prisoner within the six months next preceding his imprisonment. The registrar shall

1866.
RYALLS v. LEADER.

gaoler of every prison to make a return of persons in custody for debt. By the 101st section (*a*) the registrar was bound to attend at the gaol and examine the prisoner "touching his estate and effects, debts, dealings and transactions." The registrar is empowered to make an order of adjudication in bankruptcy against the prisoner, and to grant him protection and to make an order for his release from prison. Therefore the registrar had judicial functions to perform; and, although the Act is silent as to whether the proceedings are to take place in public or private, it requires notice of the registrar's attendance to be given to the gaoler and the execution and detaining creditors. It is not an ex parte proceeding, and the prisoner may retain an attorney and counsel. The judgment of the registrar is final and conclusive as to matters upon which he has adjudicated. This is as much a judicial proceeding as proceedings before a magistrate on the preliminary investigation of a criminal charge, the publication of which is privileged: *Lewis* v. *Levy* (*b*). The registrar acts for the commissioner.

certify the particulars of each case to the Court of which he is registrar."

Sect. 102.—"If the prisoner shall refuse to appear or to be sworn, or to answer all lawful questions of such registrar or of the execution or detaining creditor, or of any other creditor who shall be present, respecting his debts, liabilities, dealings, and transactions, or to make a full discovery of his estate and effects, and of all his books of account, or to produce the same, or to sign his examination when taken, the registrar shall report the same to the Court, and the Court may, by warrant under the hand and seal of the Judge or Commissioner, commit him to the common gaol of the county, there to be kept, with or without hard labour, for any time not exceeding one month, and the Court may at the same time adjudge such prisoner bankrupt, provided that if after such adjudication the bankrupt shall, before the period of such commitment has expired, submit to be examined, and in all things conform to the jurisdiction of the Court, he shall have in all respects the same benefit as if he had submitted to the Court in the first instance."

(*a*) *Ante*, p. 556.

(*b*) E. B. & E. 537.

Upon an application to a Judge at Chambers to discharge a bankrupt out of custody the Judge acts under a delegated authority from the Court, but the publication of the proceedings before him is privileged: *Smith* v. *Scott* (*a*). There is no case which says that the proceedings must be in a public Court, it is enough if the report is substantially a fair and correct report of judicial proceedings: *Andrews* v. *Chapman* (*b*). But, secondly, this is a public Court. The public have a direct interest in it, as it affects both liberty and property. The act of parliament being silent on the subject, the prisoner might insist upon the right of the public to be present to watch the proceedings. [*Channell*, B.—In *Garnett* v. *Ferrand* (*c*) it was decided that a coroner might in his discretion exclude the public from his Court, but the judgment proceeded on the ground that no action will lie against a Judge of a Court of record for an act done by him in his judicial capacity.] The notice of the order of the commissioner made this a public Court. [*Bramwell*, B.—If no one had any right to be admitted except a creditor, the gaoler might compel every creditor to prove his debt before he admitted him.] By the 51st section of the Bankruptcy Act, 1861, the commissioners may sit at Chambers for the dispatch of such part of the business of their Court as can, without detriment to the public advantage arising from the discussion of questions in open Court, be heard in Chambers. The 52nd section (*d*)

(*a*) 2 Car. & K. 580.

(*b*) 3 Car. & K. 286.

(*c*) 6 B. & C. 611.

(*d*) Sect. 52.—"The registrars of the Court of Bankruptcy shall have power to make adjudication of bankruptcy, to receive the surrender of any bankrupt, to grant protection, to pass the last examination of any bankrupt in cases where the assignees and creditors do not oppose, to hold and preside at meetings of creditors, to audit and pass accounts of assignees, and to sit in Chambers and despatch there such part of the administrative business of the Court and such uncontested matters as shall be defined in general orders, or as

1866.
RYALLS v. LEADER.

authorises the registrars to sit in Chambers. By the 101st section (*a*) the adjudication in bankruptcy against the prisoner and his release from prison result from the examination. By the 102nd section (*b*) the prisoner may be committed to goal for a month, with hard labour, if he refuses to answer the questions of *any creditor who may be present* respecting his debts, liabilities, dealings and transactions. It is of importance to prisoners that the public should be present to control any abuse of the power of the registrar. [*Pollock*, C. B.—The ground of privilege in the publication of proceedings in a Court of justice is, that what a portion of the public who are present must hear, the rest of the public may have the opportunity, as they have the right, of knowing through the medium of the press.] In *Rex* v. *Wright* (*c*) *Lawrence*, J., observed that "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings." [*Channell*, B.—The 54th section empowers the registrar to summon witnesses, and they are liable to all the consequences of perjury.] The power of the registrar, in his

the commissioner in any particular matter shall direct; but nothing herein contained shall empower a registrar to commit, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge. The registrar may adjourn any matter coming before him for the consideration of the commissioner. The Lord Chancellor may, by order, from time to time authorize the registrar of any County Court to exercise any of the powers hereby given to the registrars of the Court of Bankruptcy."

(*a*) *Ante*, p. 557.

(*b*) *Ante*, p. 558.

(*c*) 8 T. R. 293.

iscretion, to exclude the public does not render the Court private Court, or the proceedings non-judicial.

Manisty and *T. Jones*, in support of the rule.—First, this as not a judicial proceeding. The registrar has no ower under the 101st section to examine witnesses, but nly the prisoner. [*Martin*, B.—The 50th and several ubsequent sections relate to practice and procedure. The 2nd points out what may be done by the registrar in ourt or at Chambers.] Those sections have no applicaon to this case, which depends entirely on the powers onferred by the 101st and 102nd sections. The comissioner is not authorized to attend at the gaol, but only order the registrar to attend. The proceeding does not ake place at the request of the prisoner, but in invitum. y the 102nd section the Court may commit the prioner for refusing to answer, but only on the report of the egistrar. It is a misapplication of the 52nd and five subsequent sections to apply them to proceedings under the 101st. The prisoner might maintain an action against the registrar, if brought by him into Court or Chambers. The egistrar has only a limited statutory power to examine the risoner, and, on his answering all questions put to him, to djudicate him a bankrupt, grant him protection, and rder his release from prison.—Secondly, this was not a public Court. A particular individual is appointed by the legislature to examine the prisoner, and he must do so at the gaol, and no other place. No notice of his attendance is given to the public, but only to the gaoler and the execution and detaining creditors. The public have no right to enter the gaol. [*Bramwell*, B.—The 102nd section has the words, "or the execution or detaining creditor, or of any other creditor who shall be present."] That only contemplates the presence of creditors, not

1866.
RYALLS v. LEADER.

of the public generally. [*Bramwell*, B.—It was a judicial proceeding from which the public were not, in point of fact, excluded.]—Thirdly, assuming that this was a public Court, the defendant is not justified in publishing a statement reflecting on the character of a third person who was not present. [*Bramwell*, B.—If it was a bonâ fide report of proceedings in a Court of justice, and the matter was relevant to the inquiry, its publication is protected.] It has never yet been decided that the publication of proceedings in a Court of justice are privileged when they reflect on the character of a person neither a party to the suit nor present at the time of the inquiry. That point was raised in *Lewis* v. *Clement* (*a*), but not decided. It is not lawful to publish even a correct account of the proceedings in a Court of justice if such an account contain matter of a scandalous, blasphemous or indecent nature: *Rex* v. *Carlile* (*b*). There *Best*, J., said that it was lawful to publish the proceedings of Courts of justice, "with this qualification, that what is contained in the publication must be neither defamatory of an individual, tending to excite disaffection, nor calculated to offend the morals of the people." Another qualification of the privilege is that the publication must be bonâ fide, otherwise a person might from malicious motives publish an accurate report of most defamatory matter. [*Bramwell*, B.—It is a mistake to call it a privilege; it is a right.] A person has no right to publish even a fair report of what passed at a public meeting if it contain defamatory matter: *Davison* v. *Duncan* (*c*).

POLLOCK, C. B.—I am of opinion that the ruling of my brother *Keating* was quite correct. A Judge is only

(*a*) 3 B. & Ald. 702. (*b*) 3 B. & Ald. 167.
(*c*) 7 E. & B. 229.

bound to state the law with reference to the facts, points and arguments before him. Much of what has been said respecting the case of *Lewis* v. *Clement* (*a*), and the judgment of *Best*, J., in *Rex* v. *Carlile* (*b*), has no bearing on this case. The complaint here is, that the defendant published a report of certain proceedings before a registrar in bankruptcy, containing matter defamatory of the plaintiff. The defence is, that the alleged libel was a fair, correct and bonâ fide statement of the proceeding before the registrar on that occasion. If it was a judicial proceeding in a public Court, and the publication was a fair, correct and bonâ fide account of what passed, this action cannot be maintained. The only question attended with any difficulty is whether the Court was a public Court. I think it was. In my opinion, instead of limiting, we ought to extend as widely as possible the right of the public to know what takes place in the administration of justice. As the jury have found that the publication was bonâ fide, and as the direction was right, the verdict ought not to be disturbed.

MARTIN, B.—I am also of opinion that the direction of the learned Judge was perfectly correct. The case depends on whether any man had a right to publish bonâ fide and honestly a report of what occurred before the registrar on this occasion; and I confess I entertain no doubt about it.

The Bankruptcy Act, 1861, contains several sections relating to practice and procedure. I collect from the 51st section that it was the object of the legislature that in general the business in bankruptcy should be conducted in public, because that section enables the Commissioners to "sit at Chambers for the dispatch of such part of

(*a*) 3 B. & Ald. 702. (*b*) 3 B. & Ald. 167.

1866.
RYALLS v. LEADER.

the business of their Court, as can *without detriment to the public advantage, arising from the discussion of questions in open Court,* be heard in Chambers." The 101st section provides a remedy for what was found to be a great evil. Debtors taken to prison voluntarily continued there, setting their creditors at defiance, although undergoing personal inconvenience. The 100*th* section requires the gaoler of every prison to make a return of every person in custody upon any process for any debt, claim, or demand whatsoever. Then by the 101st section the Commissioner, on receiving such return, is required to order a registrar of the Court of Bankruptcy to attend at the gaol on a day to be named; and notice of such order must be given to the gaoler and also to the execution and detaining creditors. On the day named in the order the registrar must attend at the prison and examine every prisoner touching his estate and effects, and the registrar is empowered to make an order of adjudication in bankruptcy, a proceeding which I apprehend is ordinarily, and which ought to be, done in public. Then, by the 102nd section, if the prisoner refuses to appear or to be sworn, or to answer all lawful questions of the registrar or of the execution or detaining creditor, *or of any other creditor* who shall be present, respecting his debts, liabilities, dealings and transactions, he may be committed to prison for a month, with or without hard labour. Is it not for the benefit of the prisoner that this power should be exercised in public? Possibly the registrar might, if he considered it expedient, exclude the general public; but he would have no right to exclude any of the creditors. It seems to me that the publication of the report of these proceedings, being bonâ fide, was justifiable. I agree with my brother *Bramwell* that it is a mistake to call it a privilege; it is a right.

BRAMWELL, B.—I am of the same opinion. I think ıat this Court was a public Court. That is shewn from ıe terms of the 101st and 102nd sections. And even if were not so, yet if the officer who holds it chooses to ake it public it would be public for this purpose.

Then as to the point made, that nothing ought to be ıblished affecting a third party even when relevant to e inquiry, I think there is no such restriction. Those ho are present hear all the evidence, relevant or irrelevant, ıd those who are absent may, as far as I can see, have all at is said reported to them. The doctrine contended for an entire novelty, because, if sound, every witness might ing an action against the publisher of the newspaper porting his evidence, and call upon that publisher to prove l the libellous statements which might be contained in his amination or cross-examination. I do not think there is ıy such qualification as that suggested, nor do I concur the other suggestion made to us, viz., that what is irrevant and libellous on a third person is not protected. here are cases where an individual must suffer for the ıblic good, and it is difficult to draw the line between levancy and irrelevancy. My opinion is, that when once ıu establish that a Court is a public Court a fair bonâ fide port of all that passes there may be published. Possibly is privilege is applied to Courts of justice because needless andals are usually avoided in them. I am therefore of ıinion that this rule should be discharged.

CHANNELL, B.—I am of the same opinion. The Court Bankruptcy, for the purposes of the Act of 1861, is, by ct. 1, entitled to exercise all the powers and authorities the superior Courts of law or equity. Sect. 52 confers the registrar large powers which formerly were the dicial duties of the Commissioner alone, and enables the

1866.
RYALLS
v.
LEADER.

registrar to sit at Chambers and dispatch there part of the administrative business of the Court and certain uncontested matters. By the 54th and 58th sections the registrar can summon witnesses, and require the production of books, papers and documents, and witnesses are liable to process of contempt for not attending, the same as if they had been subpœnaed in a Court of law.

Now it was not contended, and I think could not be successfully contended, that if this had been a proceeding before the registrar under the 52nd section, it would not have been a proceeding in a public Court of justice. But we are told that the powers of the registrar with respect to the examination of prisoners in gaol depend on the 100th, 101st and 102nd sections, and that the larger powers conferred by the 52nd have no application to proceedings under those sections. In my opinion that is a narrow and uncalled for construction of the Act; and that the powers of the registrar with regard to prisoners are of a cumulative character. The 100th section requires every gaoler to make certain returns as to prisoners in gaol. By the 101st section the Commissioner must order the registrar to act, and in carrying out the authority given by that section the registrar must go to the gaol. No doubt in that and other respects the proceedings are different from those before a registrar in Court or in Chambers; but that is no ground for holding that they are not of a judicial character, or that the Court is not a public Court. The 102nd section requires the prisoner to appear and be sworn and answer all lawful questions of the registrar, the execution and detaining creditor, and *any other creditor who shall be present.* This power is given partly for the protection of the public, and to prevent prisoners from continually remaining in gaol and depriving their creditors of the benefit of an adjudication in bankruptcy, and partly in ease of the prisoners

themselves; and looking at what the registrar may do at the gaol, and that the prisoner is bound to answer the questions any creditor may put to him, I think that there is sufficient publicity in the proceedings to render them proceedings in a public Court of justice. Even if the Judge has the power in certain cases to exclude the public, as the Court is open to the parties interested, who have a right to hear what passes, I think that is sufficient for the purpose of these proceedings to make it a public Court.

Another point has been made, and it has been contended that even assuming this to be a public Court the report in question was not such a report of proceedings in a Court of justice as the law protects, because it reflects upon the character of a third person. I am not prepared to accede to that. I think that when the matter is not wholly irrelevant to the inquiry, even though it reflects on the character of a third person, its publication is privileged. What then is the complaint here? It is the publication of a statement by the prisoner reflecting on the character of his partner. But the prisoner may have been taken in execution for a joint debt; and I cannot for a moment think that the reference to the conduct of his partner is so wholly irrelevant that its publication should be deprived of protection. Therefore on both these grounds I think that the rule ought to be discharged.

Rule discharged.

1866.

TRINITY VACATION, 29 VICT.

June 26.

THE ATTORNEY GENERAL OF THE PRINCE OF WALES v. CROSSMAN.

In an information by the Attorney General of the Prince of Wales, to recover dues alleged to be payable to him in right of his Duchy of Cornwall, the Court refused to change the venue from Middlesex to Devonshire on the ground of inconvenience and expense in bringing the defendant's witnesses from Torquay to London, it appearing that it would be more convenient for the Attorney General to try in Middlesex.

It is incumbent on the officers of the Crown to make out clearly the prerogative in any case where they claim to be on a different footing from the subject as regards procedure in any litigation.

The rights of the Prince of Wales in respect of the Duchy of Cornwall are on the same footing as those of the Crown: Per *Bramwell*, B.

THIS was an information by the Attorney General of the Prince of Wales to recover customs and dues alleged to be payable to him in right of his Duchy of Cornwall, for goods imported by the defendant into the outport of Torquay, within the water of Dartmouth. The venue was laid in Middlesex. The defendant pleaded nil debet. After issue joined an application was made on behalf of the defendant to a Judge at Chambers to change the venue from Middlesex to Devonshire, on the ground that the cause of action arose in Devonshire and the defendant and all his witnesses resided at Torquay. The matter having been referred to the Court,

F. M. White, in last Trinity Term (*a*), obtained a rule nisi on the same grounds, when

Karslake and *Garth* shewed cause in the first instance.—The practice as to changing the venue applies only to ordinary actions, and not to an information of this kind. The Prince of Wales has a prerogative right, as Duke of Cornwall, to file an information in this Court, and lay and keep the venue in any county he pleases. [*Bramwell*, B.—In the case of *The Attorney General* v. *Smith*, where it was

(*a*) June 5.

sought to change the venue from Middlesex to Lincoln on an affidavit that the defendant and his witnesses resided in Lincolnshire, this Court held that the venue could not be changed in an information by the Attorney General without his consent.] As regards the Duchy of Cornwall, the Prince of Wales has the same rights as the Crown. There is an identity of interest betweeen them, for in the event of there being no Prince of Wales the Duchy would revert to the Crown: *The Attorney General to the Prince of Wales* v. *Sir John St. Aubyn* (*a*). If the Prince of Wales died pendente lite, the Attorney General for the Crown might proceed with the information: *The Attorney General* v. *The Mayor and Commonalty of Plymouth* (*b*). The Rules on the Revenue side of the Exchequer extend to suits and proceedings at the instance of the Attorney General of the Prince of Wales: Reg. Gen. June, 1860, r. 140 (*c*), Reg. Gen. November, 1863, r. 12 (*d*). The Crown has such an interest in this matter that the Attorney General might interpose and demand as of right a trial at bar: *Rowe* v. *Brenton* (*e*). In that case the jury must be summoned from Devonshire. By the Crown Suits Act, 28 & 29 Vict. c. 104. s. 46, if the Attorney General waives his right to a trial at bar the Court may change the venue to any county he elects. That statute applies as well to informations by the Attorney General of the Prince of Wales as the Attorney General for the Crown: sect. 5. (3). The origin of the practice as to changing the venue is stated in Tidd's Practice, vol. 1, p. 601, 9th ed., where it is said to be founded on the equity of the statutes 6 Rich. 2, c. 2, and 4 Hen. 4, c. 18; but the Crown, not being named in those statutes, is not bound by them; and, moreover, they have no application to informations, but only to actions commenced by writ.

(*a*) Wightwick, 167. 258.
(*b*) Wightwick, 134.
(*c*) 6 H. & N. i. xxi.
(*d*) 2 H. & C. 430.
(*e*) 3 Man. & Ry. 133; Concan. Rep. 1.

1866.

ATTORNEY GENERAL OF PRINCE OF WALES v. CROSSMAN.

[*Martin*, B.—The learned author is there speaking of the change of venue upon the common affidavit formerly used, that the cause of action arose wholly in a particular county, and not in that in which the venue was laid. That is different from changing the venue on the ground of convenience, which is founded on the principle that every Court has power so to conduct its proceedings as to administer justice in the most economical and beneficial manner.] In a proceeding by information the venue was never changed upon the common affidavit. [*Kelly*, C. B.—In Com. Dig., tit. "Prærogative" (D 85), it is said: "The King may lay his action in what county he pleases, in any personal action." So, for lands in any county, he may lay his action in the Exchequer, and try it in that Court."] The defendant relies on the case of *The Attorney General* v. *Lord Churchill* (*a*), but that case only decided that in an information of intrusion the Crown has not a prerogative right to lay the venue in any county, or to issue a venire facias juratores into a different county. There, however, the Court point out that neither the statutes nor the practice as to changing the venue bind the Crown. [*Channell*, B., referred to the *The Attorney General* v. *Hallett* (*b*).] The question to be tried mainly depends on records and documents in the office of the Duchy in London, and it would be equally inconvenient to take them to Devonshire as it would be for the defendant to bring his witnesses to London.—They also relied upon an affidavit that inquiries had been made at the office of the Queen's Remembrancer, and that there was no record in that office of any precedent for a change of venue, at the instance of a defendant, in a personal suit commenced by information of the Attorney General for the Crown, or the Attorney General of the Prince of Wales suing in right of his Duchy of Cornwall.

(*a*) 8 M. & W. 171 (*b*) 15 M. & W. 97.

F. M. White, in support of the rule.—The principles which govern this case are laid down in the judgment in *The Attorney General* v. *Lord Churchill* (*a*). Even where the information is at the suit of the Crown, the Court will consider themselves bound by the practice as between subject and subject, unless the Crown establishes its prerogative. The 6 Rich. 2, c. 2, assumes that in transitory actions a practice formerly prevailed of laying the venue in the county in which the contract was made, and the object of that Act was to restore the ancient practice which had been departed from. Subsequently the Courts, acting upon the equity of that statute, and in accordance with the old practice, compelled plaintiffs to lay the venue where the cause of action arose, in order that defendants might not be deprived of their right to have the cause tried at the least expense. In local actions, to which the 6th Rich. 2, c. 2, did not apply, the practice was always to lay the venue in the county in which the cause of action arose. Although this information is nominally for the recovery of a debt, it is in reality for the recovery of a rate, or toll, or custom in respect of a local hereditament. The right claimed especially depends upon locality, for the dues can only be taken within a certain limited area. Though in one sense this is a proceeding "in personam," yet it is not strictly "personal." In *The Attorney General* v. *Lord Churchill* the Court point out that the word "personal" must be construed according to the subject-matter. There is no precedent whatever for this claim of prerogative by the Prince of Wales. In the case of a peer, who had laid the venue in London, where the cause of action arose, the Court changed it because a fair trial could not be had there: *The Earl of Shaftesbury* v. *Cradock* (*b*). [*Karslake* referred to *Standford* v. *Nedham* (*c*).] So in the case

(*a*) 8 M. & W. 171. (*b*) 1 Vent. 363.
(*c*) 1 Lev. 56.

1866.

ATTORNEY GENERAL OF PRINCE OF WALES v. CROSSMAN.

of attornies and other officers of the superior Courts, who have the privilege of suing in Middlesex, the Court in their discretion change the venue: *Bisse* v. *Harcourt* (a), *Pye* v. *Leigh* (b). The cases of *The Attorney General of the Prince of Wales* v. *Sir John St. Aubyn, The Attorney General* v. *The Mayor and Commonalty of Plymouth*, only shew that when the Crown is interested in the Duchy of Cornwall in its own right, it files the information. When the Prince of Wales claims in his own right, he may file an information, and in the event of the Duchy reverting to the Crown, pendente lite the Crown may continue the proceedings. It is conceded that the Crown might demand a trial at bar, because it has an interest in the subject-matter: *Rowe* v. *Brenton*. But there is no authority or dictum that all the prerogatives of the Crown attach to the Prince of Wales when suing in right of his Duchy of Cornwall. It would be inconvenient and expensive for the defendant to bring his witnesses from Torquay to London.—He also referred to *The Prince's Case* (c).

Cur. adv. vult.

The following judgments were now delivered.

BRAMWELL, B., said.—In the case of *The Attorney General of the Prince of Wales* v. *Crossman* I wish briefly to express my opinion.

It seems to me that the counsel for the Attorney General of the Prince of Wales have succeeded in shewing that his right in respect of the Duchy of Cornwall are on the same footing as those of the Crown. But, looking at the nature of the application and the answer

(a) Carth. 126. (b) 2 W. Black. 1065.
(c) 8 Rep. 14.

to it, I doubt whether any question of prerogative arises; because, substantially, the application is made and resisted on the ground of convenience, the defendant saying that it would be more convenient to try the cause at Exeter; and the Attorney General for the Prince of Wales, although asserting his right irrespective of convenience, also saying that it would be more convenient to try in Middlesex. So far as I can judge, the balance of convenience is not such that, if this were an action between subject and subject, we should interfere with the right of the Attorney General for the Prince of Wales to lay the venue in any county he thought fit; and I do not think that we ought now to interfere. But I should be sorry to lay down, without much consideration, that the Attorney General might, if he thought fit, lay the venue in an inconvenient county. I am not prepared to assent to any such proposition.

I do not at all dissent from the judgment about to be delivered by my brother *Channell.*

CHANNELL, B.—The judgment which I am about to read is that of the Lord Chief Baron, my brother *Martin* and myself.

This was an information filed by the Attorney General for his Royal Highness the Prince of Wales, Duke of Cornwall, to recover certain port dues alleged to be due from the defendant, claimed by the Duchy in respect of goods brought into and landed at Torquay, which is alleged by the Attorney General for the Prince to be a member of the port of Dartmouth, referred to in Hale's De Portibus Maris, p. 48.

The venue in this information is laid in Middlesex. Application was made by the defendant to a Judge at Chambers to change the venue to the county of Devon. This application was supported by an affidavit which, if

1866.

ATTORNEY GENERAL OF PRINCE OF WALES v. CROSSMAN.

made in an ordinary action between subject and subject, and not answered, would have been sufficient to entitle the defendant to have the venue changed on the ground that the cause of action arose within the county of Devon. It would still, however, have been open to the Judge in such an action to have retained the venue in, or restored it to Middlesex, notwithstanding the cause of action arose in the county of Devon, upon being satisfied upon affidavit that on the score of saving expense, or some manifest inconvenience, it was proper that the trial should take place in Middlesex.

In the present case the Judge at Chambers, on certain objections being made on behalf of the Attorney General for the Prince, referred the application to the Court.

Accordingly, in last Term, Mr. *Meadows White*, on the part of the defendant, obtained a rule to change the venue to Devon, but against which cause was shewn in the first instance by Mr. *Karslake* and Mr. *Garth* on behalf of the Attorney General.

It was contended on the part of the Attorney General that the Court had no power to change the venue in this case; that the Attorney General of the Prince of Wales, Duke of Cornwall, is, in cases affecting the rights of the Duchy, in the same position as the Attorney General for the Crown, and that they both have the right not only to lay the venue where they please, but to keep it there.

It was further contended that the application of a defendant by motion to change the venue arose upon the equity of the statutes of Richard the 2nd and Henry the 4th, and that these statutes did not bind the Crown, the Crown not being named in them: (see the judgment of the Court delivered by Baron *Parke* in the case of *The Attorney General* v. *Lord Churchill* (*a*), where

(*a*) 8 M. & W. 171. 193.

he origin of the practice of changing the venue in actions explained. See also Tidd's Practice, 9th ed., vol. 1, . 601, and following pages.) It was further contended at the statutes applied to actions only and not to information.

We are agreed that it is for the officers of the Crown to ake out clearly the prerogative in any case where they laim to be on a different footing from the subject as egards procedure in any litigation. This was in effect id down in the case before referred to, namely, *The ttorney General* v. *Lord Churchill* (*a*).

We think, although the Attorney General for the rown may not have a right in all cases to lay, but also to tain, the venue where he pleases, that in an information such as the present, which is a suit in the nature of a ansitory action, he would have the right.

It would not necessarily follow that the Attorney General the Prince of Wales would have the same right. The authoties cited to us to shew that he would, were *The Attorney eneral of the Prince of Wales* v. *The Mayor of Plymouth*; ightwick's Reports, page 134, and *The Attorney General the Prince of Wales* v. *St. Aubyn*, Wightwick's Reports, ge 167; Rules on the Revenue side of the Exchequer, ne 1860, rule 140; November 1863, rule 12; Crown its Act, 28 & 29 Vict. c. 104. *Rowe* v. *Brenton*, Manning & Ryland, p. 133, was also referred to.

We think in this case that the Attorney General to the ince of Wales must be taken to be in the same situation the Attorney General of the Crown. But it does not pear to us absolutely necessary to decide whether in the se of an information such as the present, if filed by the rown, the Crown would have a right to lay and keep the nue where it pleased; nor whether if, as against the

(*a*) 8 M. & W. 171.

1866.

ATTORNEY GENERAL OF PRINCE OF WALES v. CROSSMAN.

Crown, the venue could not be charged on motion, the Crown not being bound by the statutes and practice referred to, the same rule would apply to the Attorney General for the Prince.

For the case was argued before us on the ground of convenience as well as on the points we have noticed. The facts on which the argument as to convenience or inconvenience proceeded were not stated on affidavit, at least no affidavit has been filed, but were referred to by counsel on each side with the sanction of the other. For the defendant, was urged upon us the inconvenience and expense of bringing up witnesses from Torquay to London to attend the trial. On the other hand, it is clear from the facts stated to us by the counsel for the Attorney General, and not disputed by the defendant's counsel, that the question to be tried must depend, to a considerable degree, upon documents and records which would be produced by the officers of the Duchy, no doubt more conveniently in Middlesex or London; nor was it disputed by the defendant's counsel that the Attorney General might allege such an interest in the Crown as to entitle him to appear and claim a trial at bar.

The inconvenience of bringing a Devonshire jury to Middlesex for a trial at bar at Westminster would be great, and would go a long way to counterbalance the inconvenience of many of the witnesses residing at Torquay. We think then that the Court ought not to interfere to change the venue, and that the rule should be discharged, but discharged without costs.

Rule discharged.

1866.

IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

SMITH AND GODDARD *v.* RIDGWAY.

June 18.

A testator, owner in fee of a manufactory on the east side of a street, and also of a manufactory on the west side of the same street, by his will devised all his messuages, lands, tenements, hereditaments and real estate whatsoever to trustees to sell the same. By a codicil, after devising certain specified freehold and copyhold lands, he devised to A. and W. his manufactory on the west side of the street in the occupation of R. and A., and also other specified messuages, together with the stables, warehouses, outbuildings and all other "appurtenances to the said messuages or tenements, lands and hereditaments belonging or appertaining." The testator, many years before his death, had demised both manufactories to R. and A. at an undivided rent, and they had always used them as one manufactory. That on the east side, which was about half the value of that on the west, could only be used as a separate manufactory if certain reparations were made.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the manufactory on the east side did not pass under the codicil as appurtenant to that on the west.

THIS was an appeal by the defendant against the decision of the Court of Exchequer in discharging a rule to enter a nonsuit. The pleadings and facts sufficiently appear in the report of the case in the Court below. (*Ante*, p. 37.).

Terrell (with whom was *Quain*) argued for the defendants (*a*), and cited *Steele* v. *The Midland Railway Company* (*b*), *Doe* d. *Collins* (*c*), and *Bodenham* v. *Pritchard* (*d*).

Mihward (with whom was *Baylis*) argued for the plaintiff, and cited *Webber* v. *Stanley* (*e*).

The arguments were in substance the same as those in the Court below.

(*a*) Before *Willes*, J., *Blackburn*, J., *Byles*, J., *Mellor*, J., *Shee*, J., and *Montague Smith*, J.

(*b*) 1 L. R. Ch. Ap. 275.

(*c*) 2 T. R. 498.

(*d*) 1 B. & C. 350.

(*e*) 16 C. B. N. S. 698.

1866.
SMITH v. RIDGWAY.

WILLES, J.—We are all of opinion that the judgment of the Court below ought to be affirmed. The question for our decision is, whether the words in the devise, "on the west side of High Street," ought to be rejected as a false description, or whether they are true words of restriction upon the general terms of the devise in which they are inserted, and of which they profess to be a limitation, in which case the Court must restrain the devise in its operation, that is to say, that the whole of the property which passed should be "on the west side" of High Street.

It is unnecessary to enter into any consideration of the authorities, because they will be found to be consistent from the time of Lord *Bacon* down to the time of the decision in *Webber* v. *Stanley* (*a*), in which *Erle*, C. J., laid down the law in the most clear and able manner. The rule is, that where there is a subject-matter to which all the words can apply, and they can operate so as to limit the other terms of the devise, they ought not to be rejected as a false demonstration. This is expressed in the maxim commented on by Lord *Bacon*, "Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram" (*b*).

The question, therefore, is whether, looking at all the words employed by the testator, they are satisfied by, and are a competent description of the property "on the west side of High Street," or whether, in order to satisfy the language of the testator taken altogether, it is necessary to say that the property on the east side passed, and that the words "on the west side" ought to be rejected as a false demonstratio.

Now that must depend, of course, on the facts, and it appears that there is, and has been for a great number of

(*a*) 16 C. B. N. S. 698. (*b*) Bac. Max. reg. 13.

years, a manufactory on the east side of the street; that at the time of the devise it could not be used for a separate manufactory without the still-house chimney being rebuilt and other work done to it. But it appears, that with some alterations and repairs it was capable of being used as a separate manufactory from that on the west side of the street. Both manufactories appear to have been taken under one lease about the year 1830. At that time the manufactory on the east side seems to have been of importance; but, in consequence of expenditure and improvements, the manufactory on the west side became the more important part of the property, and the principal process of the manufacture seems to have been carried on there. But the manufactory on the east side appears to have been capable of being used separately, though it is not very clear whether it could be so used immediately, or only after some expenditure upon it. In point of fact, however, it would seem that both manufactories were more or less used for the purpose of the same business from 1830 down to the present time.

Thus it appears that at the time of the devise and of the testator's death there was a manufactory on the west side answering the description in the devise, and there was another manufactory on the east side, which does not come within its terms unless we reject the description "on the west side." Now, before we can reject language of the testator applicable to the subject-matter existing at the time the words were used, some reason must be presented to us. One reason strongly relied upon by the defendant's counsel, and indeed the main foundation of this argument, was, that in this will we find the term "manufactory" accompanied with general language sufficient to describe all that is necessary to constitute the entire manufactory, viz., all "members and appurtenances to the said messuages

1866.
SMITH v. RIDGWAY.

or tenements, lands and hereditaments belonging or appertaining." Those are the ordinary general words, with the exception of "used therewith," which are inserted in order to include any small members of the property which may have been omitted in the preceding specific description. It was urged that the manufactory on the east side of the street ought to be held to pass "as belonging or appertaining to" the factory on the west side.

I apprehend the rule upon this subject is clear. There is no doubt that words which primâ facie describe a building only may include land so connected with the building and used with it as in the popular acceptation to be included in the mention of it: *Steele* v. *The Midland Railway Company* (*a*), and the cases collected in the notes to *Smith* v. *Martin* (*b*). The word "manufactory," which is a more vague term than "house," may mean not merely the building within which the machinery works, but may also include outbuildings necessarily used in the course of the manufacture, such as a drying-house, or land used in the course of the necessary processes. But in this case the difficulty is, that the building sought to be included is capable of being used as a manufactory. It is not a mere accessory, except by the use to which it was put by the tenants of the manufactory, with which it is said to pass as a member; but it is a separate manufactory; not one of those small things which would pass under the words "appurtenances," or as shewn in the notes to *Smith* v. *Martin* even without that word. Moreover, it is to be observed, that between the description of the manufactory and the general words there is inserted, first, a devise of a "messuage on the east side of High Street;" secondly, a devise of another "messuage on the east side of Henley aforesaid;" and, thirdly, a devise of five mes-

(*a*) 1 L. R. Ca. Ap. 275. (*b*) 2 Wms. Saund. 401.

suages or cottages at the corner of Broom Street, Henley, aforesaid;" all of which, like the manufactory in question, are described somewhat precisely by way of locality, and then follow the general words. Therefore it may well be that the general words have application to some portion of the devise, but it is not necessary to find them an application which shall extend them to a subject-matter of precisely the same description as the manufactory on the west side.

It would seem, therefore, that the proper answer to the question, whether this is a false description of that which was properly described without it, is that there is a true description of the manufactory on the west side. I would observe that we are not pressed with an argument often used on these occasions, namely, that there is apparent on the face of the instrument an intention on the part of the testator to dispose of all his property. The result of holding that the manufactory on the west side alone passes is not that the testator died intestate as to the manufactory on the east side, because if that manufactory does not pass under the codicil it passes under the will to the trustees in trust for sale.

Upon the whole, therefore, we do not see our way to a different conclusion from that at which the Court of Exchequer arrived; nor do we feel ourselves justified in striking out of the will the words of the description, "on the west side High Street in Henley aforesaid;" and therefore the judgment of the Court below must be affirmed.

Judgment affirmed.

1866.

IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

June 19.

WEBBER *v.* THE GREAT WESTERN RAILWAY COMPANY.

A package addressed to the plaintiff was delivered to P. at Worcester, to be carried from Worcester to Chester. P. (who acted as agent for receiving goods both of the Great Western Railway Company and the London and North Western Railway Company), delivered the package to the Great Western Railway Company, with directions that it should go by the London and North Western Railway. The Great Western Railway Company made out a way bill in the usual form of their way bills. The London and North Western Railway Company have no communication with a station at Worcester, but their line joins the Great Western Railway at Stafford. The package was carried in a waggon of the Great Western Railway Company to Stafford, and from thence on the line of the London and North Western Railway Company to Chester. The contents of the package having been damaged on the journey:—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that there was evidence from which the jury could properly find a contract by the Great Western Railway Company with the plaintiff to carry the whole distance from Worcester to Chester, and therefore they were liable for the damage.

THIS was an appeal by the defendants against the decision of the Court of Exchequer in discharging a rule to enter a verdict for the defendants.—(Reported, 3 H. & C. 771.)

The case on appeal stated the following facts (*a*), as proved by the plaintiff.—The plaintiff purchased a clock from Messrs. Sherratt, at Worcester, and directed them to send it to his address at Chester.

Messrs. Sherratt, having packed the clock, addressed it to "R. Webber, Esq., Chester," and delivered it so addressed to Messrs. Pickford at their office in Worcester.

3. Messrs. Pickford took the package to the defendants' station at Worcester, and delivered it to a clerk of the defendants there in good condition, together with a consignment note of which the following is a copy:—

(*a*) The pleadings sufficiently appear in the report, 3 H. & C. 771.

"West Midland Railway.

"Received from P. & Co.	Skerratt.
"per L. & N. W. Ry.	Care.
Webber, Esq.	2 boxes.
"Chester.	

"Charges forward."

4. At the time of such delivery to the defendants Messrs. ickford gave directions that the package should go by the ondon and North Western Railway. The defendants e their own discretion as to whether such directions ould or should not be followed, sometimes striking out ch directions and sometimes allowing them to remain d acting upon them.

5. Messrs. Pickford are the appointed agents of the London d North Western Railway Company, but act as agents r the Great Western Railway Company also, and the m of R. T. Smith & Co. are the appointed agents of the fendants, and both firms have offices in Worcester.

6. The defendants have a direct communication between orcester and Chester by means of their own line. The ondon and North Western Company have no communition with a station at Worcester, and the nearest point Worcester at which the systems of the London and orth Western Railway Company and of the Great Wesrn Company join is at Bushbury, near Stafford, and ods intended to go by the London and North Western ailway are put into a wagon at starting at Worcester, hich wagon is labelled "Via Bushbury," and it is believed at this was done in this instance with the package in iestion.

7. The package was conveyed to Chester and delivered the plaintiff, and a way bill, of which the following is a py, was sent with the goods, and in due course arrived Chester with them.

Great Western Railway.

Goods invoiced, No. 953. Progressive No.
From Worcester to Chester. Invoice arrived 186 h. m.
Route viâ clock train, March 14, 1864. Goods arrived 186 h. m.

Reference to Delivery Book.	Waggon.	No. of consignment note.	Consignor.	Consignee, the residence.	No.	Goods. Weight. Description.	Mail.	Goods carted.	Goods not carted.	Rate.	Delivery or paid through.	Paid on.	Paid.	To pay.	Amount to Ledger.	Folio.	Amount to Station.
								1 0 0	1 23	60				1s. 6d.			
P. & Co. from 1697 Stafford.		445	P. & Co.	Webber, Chester.	2	Boxes.						8 and 16/36/4					
				R. Webber.	28	Taum Road, Chester.		Sd. J. Wemald									

8. The plaintiff received the package at the Chester general station, and there paid for the carriage for the whole distance, and the defendants paid Messrs. Pickford for the carting of the goods from their office in Worcester to the defendants' station there.

9. On the delivery of the clock at Chester it was found to be broken, but there was no evidence to shew at what period of the journey between Worcester and Chester the damage had been done.

No evidence was given on behalf of the appellants.

The question for the decision of the Court is, whether there is such evidence of a contract with the defendants as would justify a verdict for the plaintiff.

If the Court shall be of opinion in the affirmative, judgment is to be entered for the plaintiff for the damages assessed by the jury. If the Court shall be of opinion in the negative, a nonsuit is to be entered.

Grove (*Horatio Lloyd* with him) now argued for the defendants (*a*).—This case was decided on the authority of

(*a*) Before *Willes*, J., *Byles*, J., *Blackburn*, J., and *Mellor*, J.— *Shee*, J., and *Montague Smith*, J., had gone to Chambers.

Muschamp v. *The Lancaster, &c., Railway Company* (*a*), and *The Bristol and Exeter Railway Company* v. *Collins* (*b*); and it is conceded that if the plaintiff had delivered the clock to the Great Western Railway Company, and they had undertaken to carry it, although not upon their own line, they would have been liable; for it has been long established that where a person contracts to carry goods he is responsible for their loss or damage notwithstanding he has delivered them to another person to carry for him. But here there was no contract between the plaintiff and the Great Western Railway Company. The plaintiff delivered the clock to Messrs. Pickford, and they delivered it to the Great Western Railway Company, with directions that it should go by the London and North Western Railway. The plaintiff's remedy is against Messrs. Pickford. There was no evidence for the jury that on this occasion Messrs. Pickford acted as the agents of the Great Western Railway Company. [*Willes*, J.—Suppose Messrs. Pickford, instead of directing the package to be sent by the London and North Western Railway, had directed it to be sent by the Great Western Railway, could they have sued that Company?]

McIntyre appeared for the plaintiff, but was not called upon to argue.

WILLES, J.—We are all of opinion that the judgment of the Court below must be affirmed.

The question is, whether there is sufficient evidence—not as regards its weight but its character—upon which the jury could properly find that the contract to carry the package from Worcester to Chester was a contract between the plaintiff and the Great Western Railway Company.

(*a*) 8 M. & W. 421. (*b*) 7 H. L. 194.

1866.
WEBBER v. GREAT WESTERN RAILWAY CO.

The contract must either have been with the London and North Western Railway Company, or with the Great Western Railway Company; and to entitle the plaintiff to succeed it was necessary for him to adduce evidence leading to the probable conclusion, and which the jury believed, that the contract was with the Great Western Railway Company. Mr. *Grove* insists that there was no such evidence.

Now, in the case of *Cotton* v. *Wood* (*a*), it was laid down that there must be evidence pointing to the one conclusion rather than the other, and that where the evidence is equally consistent with either view it is not competent to the Judge to leave the matter to the jury. So in *Avery* v. *Bowden* (*b*) it was laid down that where the evidence leads only to conjecture it is not fit for the consideration of the jury. That doctrine has not only been laid in modern cases, but so long ago as the time of *Plowden* (*c*) it was held that in civil cases it was sufficient if either party had a reasonable probability in his favour.

Then is there in this case sufficient evidence to turn the balance of probability that the contract was rather with the Great Western Railway Company than the North Western Railway Company? We think there is. In the first place it does not appear that goods intended to go by the London and North Western Railway could be conveyed otherwise than in the manner stated in the 6th paragraph. In the next place the way bill was made out by the Great Western Railway Company in their office, and in the form of their way bills. That is a circumstance for the consideration of the jury; and in addition there is a circumstance of considerable weight, viz., that the London and North Western Railway Company had no line by which they

(*a*) 8 C. B. N. S. 568. (*b*) 6 E. & B. 953.
(*c*) Plowden, 412.

ould carry the whole distance Worcester to Chester, the nly line by which there was a direct communication between hose places being that of the Great Western Railway Company. These circumstances make it more probable hat the contract was with the Great Western Railway Company than with the London and North Western Railway Company.

Then comes the question whether the contract was with Messrs. Pickford or with the plaintiff. The facts shew hat the contract was with the plaintiff. There is the circumstance of the plaintiff being described in the way ill as consignee of the goods; and, although Messrs. Pickford were agents for the London and North Western Railway Company, they also acted as agents for the Great Western Railway Company. It further appears that when Messrs. Pickford brought parcels to the Great Western Railway Company, and gave directions that they should go by the London and North Western Railway Company, the Great Western Railway Company were in the habit of treating them, not as the directions of the customer but of heir agent Messrs. Pickford, and of using their discretion s to whether such directions should or should not be followed. There is, therefore, the most probability that the ontract was with the plaintiff, and the jury have found hat in fact the contract was with him. We think that heir view was quite correct; and the judgment of the Court below must be affirmed.

Judgment affirmed.

1866.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

June 19.

ERNST REUSS AND ERNST GUSTAVUS REUSS *v.* PICKSLEY and Another.

A proposal in writing of the terms of a contract signed by the party to be charged, to which the other party afterwards assents by parol, is a sufficient memorandum of an agreement within the 4th section of the Statute of Frauds.

THIS was an appeal by the defendants against the judgment of the Court of Exchequer in discharging a rule to enter a nonsuit, or for a new trial (*a*).

The first count of the declaration stated, that on the 8th of September, 1864, it was agreed (amongst other things), by and between the plaintiffs and the defendants, that the defendants should retain and employ the plaintiffs as the agents of the defendants in Russia for ten years, from the day and year last aforesaid, in and about the sale for the defendants in Russia of machinery manufactured by the defendants in their trade or business of engineers and machine dealers, to wit, at Leigh, near Manchester: that the defendants should allow to the plaintiffs full discounts for cash on all orders received by the plaintiffs direct, and that the defendants should hand over to the plaintiffs to be dealt with in the same way all orders that defendants should receive from Russia, except those from Odessa, and that on all orders executed by the defendants from Russia, except Odessa, that might come through any other agents in Great Britain, the defendants should allow the plaintiffs a commission of 5*l.* per cent.; and it was further agreed that the plaintiffs should confine themselves to the defendants

(*a*) Not reported. The Court discharged the rule, considering themselves bound by the authority of *Smith* v. *Neale*, 2 C. B. N. S. 67.

for the sale of every description of machinery which the defendants manufacture, and the plaintiffs should sell in Russia. And it was also thereby further agreed with respect to certain machines of the defendants in Hull, intended for the Moscow Exhibition, and to be exhibited there by the defendants, that the plaintiffs should take charge of the same, and that the plaintiffs should pay for their account, and all freight charges, assurance, &c., in respect of the same until delivered in Moscow aforesaid, as many of such machines as possible, and that after the close of the said Exhibition in Moscow the unsold remainder should be at the risk and expence of the defendants, either to keep in Moscow aforesaid or return home, as the defendant might think fit, at the defendants' expence. That the plaintiffs should pay the defendants, to wit, in Manchester, cash for all machines sold during the said Exhibition, the price to be calculated at list price, less the full trade discounts for cash; that the defendants should pay travelling expences there, to wit, Moscow and back, of Mr. Smith. And the plaintiffs aver performance of all conditions precedent, and that all things were done and happened and all times elapsed before this suit, necessary and proper to enable the plaintiffs to maintain this action in respect of the breaches hereinafter mentioned.—Yet the defendants did not nor would allow to the plaintiffs full discount for cash on the several orders received by the plaintiffs direct, as agreed, but therein made default, nor did nor would the defendants hand over to the plaintiffs to be dealt with in the same way the several orders which the defendants received from Russia, except those from Odessa, as agreed, but therein made default; nor did nor would the defendants hand over to the plaintiffs to be dealt with in the same way the several orders which the defendants received from Russia, except those from Odessa,

1866.
REUSS
v.
PICKSLEY.

as agreed, but therein made default; nor did nor would the defendants on the several orders executed by the defendants from Russia, except Odessa, and which came through other agents in Great Britain, allow the plaintiffs the commission of 5*l.* per cent., as agreed, but therein made default. And the plaintiffs further say that although the plaintiffs were ready and willing to continue such agency as aforesaid, upon the terms aforesaid, yet the defendants during the continuance of the said agency, and whilst the said agency was still subsisting and undetermined, and before the expiration of the said term of ten years, contrary to the said agreement, wrongfully discharged and dismissed the plaintiffs from the said agency and employment, whereby the plaintiffs were and are deprived of divers great gains and profits, &c.

Plea (inter alia).—That it was not agreed by and between the plaintiffs and defendants as alleged.—Issue thereon.

The case was tried before *Pigott*, B., at the Manchester Winter Assizes, 1865, when the following facts appeared:—The plaintiffs carried on business at Manchester, in partnership, as merchants, and the defendants were agricultural implement makers at Leigh, near Manchester.

In April, 1864, the plaintiffs and defendants had some interviews and negotiations on the subject of an intended Exhibition at Moscow, when the terms of an agreement were discussed, the plaintiffs declining to look after the goods at the Exhibition, not seeing how he could be benefited by it, as defendants' names were on the machines, when, according to plaintiffs' evidence, the defendants said, to obviate the difficulty, they would make an agency with the plaintiffs for ten years if the plaintiffs would bear part of the expense of the Exhibition; that the defendants would guarantee an agency for ten years, and that all orders which came to them directly or indirectly they

would give plaintiffs a commission on. The plaintiff Ernst Reuss stated that he was going out to Vienna and would go on to Moscow and superintend it himself.

The terms were not then reduced to writing, but the plaintiff Ernst Gustavus Reuss went in May, 1864, to Vienna on other business, and on the 17th day of July, 1864, left Vienna for Russia, where he stayed a month, and was during that time occupied, amongst other things, in making the necessary arrangements for exhibiting the defendants' machinery at the Moscow Show, and returned home in the latter end of August. In the meantime a quantity of goods had been sent by the defendants to the plaintiffs for the purpose of being forwarded to the said show.

On the return of the plaintiff Ernst Gustavus Reuss, the plaintiffs sent to the defendants a letter, dated the 7th September, 1864, stating that they should like to see Mr. Sims to-morrow, if possible, on business of importance.

The plaintiff Ernst Reuss and the defendant Sims accordingly met, and after their interview the plaintiffs wrote to the defendants the following letter:—

"Manchester, 8th September, 1864.

"Messrs. Picksley, Sims & Co., Leigh.

"Referring to our conversation with Mr. Sims" (meaning the defendant Sims) "respecting the machinery for the Moscow Exhibition, it was arranged that we take charge of all the machines, &c., in Hull, and pay for our account all freight, charges, insurances, &c., till delivered in Moscow.

"That we sell in Moscow as many of the machines as possible, and that after the close of the Exhibition the unsold remainder be at your risk and expense, either to keep in Moscow or return home, as you think fit, at

1866.
Reuss
v.
Picksley.

your expense. That we pay you here cash for all machines sold during the Exhibition, the price to be calculated at list price less the full trade discounts for cash. That you pay the travelling expenses there and back of Mr. Smith, but that we pay his additional salary whilst in Moscow of 10*s*. per day and his hotel bill. That the agency for Russia be for ten years (10) from date, on following conditions:—You to allow us full discounts for cash on all orders received by us direct, and that you hand over to us, to be dealt with in the same way, all orders you receive from Russia (excepting those from Odessa). On all orders executed by you from Russia (excepting Odessa) that may come through any other agent in Great Britain you allow us a commission of five (5) per cent. That we act as and are hereby appointed your sole agents for the kingdom of Italy on the same conditions as for Russia. Awaiting your reply, We are, Gentlemen, Yours truly,

"Ernst Reuss & Co."

To that letter the defendants replied as follows:—

"Bedford Foundry, Leigh,
"Lancashire.

"Gentlemen. "September 9th, 1864.

"Our Mr. Sims desires me to acknowledge the receipt of your favour dated the 8th inst., and to say, as far as the agency for Russia goes, he considers it satisfactory (except that you must confine yourselves to us for every description of machinery we manufacture, and which you sell in Russia). With respect to Italy, Mr. Sims cannot at present say anything about it, in consequence of the change which is likely to take place in our firm shortly. I am, Gentlemen, Yours very truly,

"pp. Picksley, Sims & Co.,
"Josh. Smith.

"Messrs. Ernst, Reuss & Co.,
"101, Portland Street, Manchester."

To this last named letter the plaintiffs sent no reply, but after that date other goods were sent by the defendants to the plaintiffs to be forwarded by the plaintiffs to Moscow for the purpose of being exhibited at the said Moscow Show in the same manner as the former goods.

After the letters of the 8th and 9th of September were received the plaintiffs on their part took charge and forwarded the defendants' goods for the Moscow Exhibition, which opened on the 27th September (new style), and the same were exhibited at and during the said Exhibition by the plaintiffs for the defendants, amounting in value to about 900*l.*, and a portion thereof were sold by the plaintiffs for the defendants amounting to 200*l.*

The plaintiffs have also made the various payments required of them by said letters of the 8th and 9th of September, in addition to other payments, in preparing, translating and publishing catalógues of the defendants' goods, amounting to 400*l.* and upwards, which far exceeded all the commission they would have been entitled to for the sale of the machinery and other goods exhibited as aforesaid.

It was objected on behalf of the defendants that there was no binding agreement within the 4th section of the Statute of Frauds.

The learned Judge reserved the point, and left it to the jury to say whether the plaintiffs accepted and acceded to the terms of the agreement contained in the letters of the 8th and 9th of September, 1864, telling them that the Moscow and Russian agency was one entire contract. The jury having found a verdict for the plaintiffs, with 850*l.* damages,

Brett, in Hilary Term, 1866, obtained a rule to enter a nonsuit, on the ground that there was no sufficient memo-

1866.
REUSS
v.
PICKSLEY.

randum in writing of the contract within the 4th section of the Statute of Frauds; or for a new trial on the ground of misdirection in the Judge ruling that the Moscow and Russian speculations were one contract; and also on the ground that the damages were excessive. The Court having discharged the rule on the plaintiffs consenting to reduce the damages, the present appeal was brought.

Brett (*Littler* with him) argued for the defendants (*a*)—There was no sufficient memorandum of an agreement within the 4th section of the Statute of Frauds. First, the plaintiffs' letter of the 8th September, 1864, contains three distinct proposals: first, as to the employment of the plaintiffs with reference to the defendants' machinery for the Exhibition at Moscow: secondly, as to the agency for Russia: thirdly, as to the agency for Italy. The defendants' letter of the 9th is a counter proposal. As to the Moscow Exhibition they say nothing. As regards the agency for Russia they admit that the plaintiffs' proposal is satisfactory, but they impose an additional term, viz., that the plaintiffs should not sell in Russia for any other person the description of machinery which the defendants manufactured; and, with respect to the agency for Italy, they state their inability to come to any determination about it. The plaintiffs did not reply to that letter, but after it was written the defendants sent to the plaintiffs goods for the Moscow Exhibition. As there was no written assent on the part of the plaintiffs, even if there had been a parol assent that would not have been sufficient to satisfy the 4th section of the Statute of Frauds. But there is no evidence of any parol assent. The acceptance by the defendants of the plaintiffs' proposal was conditional on the proposal being

(*a*) June 19. Before *Willes*, J., *Byles*, J., *Blackburn*, J., *Mellor*, J., *Shee*, J. and *Montague Smith*, J.

modified. But in order to render a written proposal binding as an agreement on the party who has signed it there must be an unconditional acceptance of it: *Warner* v. *Wilmington* (*a*). Secondly, assuming that there was a parol acceptance by the plaintiffs of a written proposal signed by the defendants, that is not a sufficient memorandum of an agreement within the 4th section of the Statute of Frauds. The decision in the Court below proceeded on the authority of *Smith* v. *Neale* (*b*); but there it was not necessary to decide this point, because the agreement was capable of being performed within the year. Here the agreement is unilateral, and, if valid, the one party would be bound for ten years, whilst the other party would have no means of enforcing it. At the time the letter of the 9th was signed by the defendants it was not an agreement or a memorandum or note of an agreement, but a proposal only, and to hold that a parol acceptance rendered it an agreement would let in the mischief which the Statute of Frauds was intended to prevent. It may be that the acceptance was only conditional. [*Blackburn*, J.—In the time of Queen Anne it was held that if a person makes a proposal in writing and signs it, and there is afterwards a parol acceptance of it by the other party, that is a binding agreement: *Coleman* v. *Upcot* (*c*). That case is cited by Lord *St. Leonards* in his Treatise on Vendors and Purchasers, p. 129, 14th ed. *Willes*, J.—In *Coleman* v. *Upcot* the acceptance was subscribed, but not until two or three days after the parol acceptance.] A proposal requires no stamp, because it is neither an agreement nor a memorandum or note of an agreement: *Vollans* v. *Fletcher* (*d*). [*Byles*, J., referred to the judgment of Sir *Thomas Plumer*, M. R., in *Martin* v.

(*a*) 3 Drew. 523.
(*b*) 2 C. B. N. S. 67.
(*c*) 5 Vin. Abrid. tit. "Contract and Agreement," 527, pl. 17.
(*d*) 1 Exch. 20.

1866.
REUSS
v.
PICKSLEY.

Mitchell (*a*).] In *The Liverpool Borough Bank* v. *Eccles* (*b*) the agreement, though accepted by parol only, had been acted upon. [*Willes*, J., referred to *Mozley* v. *Tinkler* (*c*).] In *Williams* v. *Lake* (*d*) *Cockburn*, C. J., pointed out that, as regards the requisites of the Statute of Frauds, there is no difference between a memorandum of an agreement and an agreement itself. [*Blackburn*, J., referred to *Laythoarp* v. *Bryant* (*e*).]

Manisty (*Holker* and *Baylis* with him).—Looking at the surrounding circumstances, it is plain that the letters of the 8th and 9th September constitute one contract by which the plaintiffs were to be compensated for the liability and expense which they incurred with reference to the Moscow Exhibition, by obtaining the Russian agency for ten years. The letter of the 9th was either a proposal afterwards assented to or the memorandum of a previous arrangement. The authorities support the proposition that a proposal in writing signed by one of the parties and followed by a parol acceptance by the other is a sufficient memorandum of an agreement within the Statute of Frauds. [He referred to *Egerton* v. *Mathews* (*f*), *Sweet* v. *Lee* (*g*).]

Brett replied.

WILLES, J.—We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed.

The action is brought upon a contract whereby it is alleged that the defendants employed the plaintiffs as the defendants' agents in Russia for the sale of their agricul-

(*a*) 2 Jac. & W. 426, 427.
(*b*) 4 H. & N. 139.
(*c*) 1 C. M. & R. 692.
(*d*) 2 E. & E. 349, 354.
(*e*) 2 Bing. N. C. 735.
(*f*) 6 East, 307.
(*g*) 3 Man. & G. 452, note *a*, 462.

tural machines, the service rendered by the plaintiffs to be paid for by a commission on all orders executed from Russia, Odessa alone being excepted. The plaintiffs, as incidental to the agency in Russia, agreed to render the defendants certain services in the exhibition of their machines at a show to be held at Moscow.

It appears that the plaintiffs, through a member of their firm, had negotiations with the defendants through a member of their firm with reference to the exhibition of the defendants' machines at the show about to take place at Moscow; and in the course of those negotiations the plaintiffs refused to incur the expense which they would have to bear unless they were remunerated in some manner. There was a communication between the plaintiffs and the defendants as to the mode of remuneration, and it was suggested that the plaintiffs should be employed not only as the defendants' agents with reference to the show at Moscow, but also for ten years as the defendants' agents for the sale of their machines in Russia, Odessa being excepted; and also that the plaintiffs should be appointed the defendants' agents for the kingdom of Italy. That negotiation when first entered into did not come to a head. One of the plaintiffs, Ernst Reuss, through whom the business was transacted, appears to have gone abroad for some time, and upon his return to this country he sent word that he desired to see one of the defendants, Mr. Sims, on business of importance, being that respecting which the negotiation had previously taken place. Accordingly, an interview took place between them at which the terms of the agency were discussed, and the letters which afterwards passed between the parties leave no doubt that the discussion related to the show at Moscow, and the agency for the sale of the defendants' machines in Russia, except Odessa,

1866.

REUSS v. PICKSLEY.

and to the agency which the plaintiffs desired to have for the defendants in Italy.

Shortly after that discussion the letter of the 8th of September, 1864, was written by the plaintiffs to the defendants, and on the following day an answer was sent by the defendants to the plaintiffs. The letter of the plaintiffs was to this effect.—[His lordship read so much of the letter as related to the Moscow Exhibition.] Having dealt with the matters relating to the Moscow Exhibition, which was to operate as accessory to the general agency, and as an advertisement, the letter proceeds to speak of matters cognate and not distinct from the matters previously discussed, and to say "that the agency for Russia be for ten years from date on following conditions." It then states that the defendants are to allow the plaintiffs full discount for cash on all orders which come direct through the plaintiffs; also on orders which the defendants received from Russia; and as the plaintiffs had the exclusive contract of agency they were to be allowed a commission on orders received by the defendants through any other agent. With respect to this part of the arrangement, it is not stated that the plaintiffs were to abstain, during the period of the agency, from taking orders from other manufacturers, and that appears to be the only part of their proposal with respect to the agency in Russia to which the defendants objected in their letter of the 9th. The letter of the 8th proceeds to say that the plaintiffs are to act as the sole agents of the defendants for Italy on the same conditions as for Russia.

Then comes the letter of the 9th:—"Our Mr. Sims desires me to acknowledge the receipt of your favour, dated the 8th inst., and to say, as far as the agency for Russia goes, he considers it satisfactory." The letter of the 8th had dealt with the Exhibition at Moscow, and also

with the valuable agency in respect of the loss of which damages were given, namely the agency for Russia, except Odessa, during a period of ten years. No reference is made to the Exhibition at Moscow as distinct from the agency in Russia. The conclusion is that the writer of the letter of the 9th considered that as to the Exhibition at Moscow no observation was required, and as to the rest of the agency for Russia it was satisfactory, except that the plaintiffs must confine themselves to the defendants for every description of machinery which the defendants manufactured and the plaintiffs sold in Russia. That was the only objection made to the agency for Russia, always excluding Odessa. So that the plaintiffs, having the sole agency for the defendants, were prevented from being the agents of others. That was a term which the defendants added. With respect to Italy, the defendants say that in consequence of an event likely to happen it is out of the question.

Therefore the meaning of the letter of the 9th September is this:—"It is true that we came to an arrangement yesterday; that was with respect to Russia, excluding Odessa and including Moscow, subject to a limitation which you had forgotten to express, namely, that you are not to be the agent of others for any description of machinery which we manufacture; and as to Italy we make no arrangement whatever."

Now, that is either a memorandum, signed by the defendants, of an arrangement which had taken place, or at least it is a proposal that the terms of the letter of the 8th should be considered as the basis of the subsequent dealings between the parties; and therefore, as stated in the first count of the declaration, that the defendants should employ the plaintiffs as the agents of the defendants in Russia for ten years, upon the terms assented to, the

1866.
REUSS
v.
PICKSLEY.

plaintiffs agreeing not to take during that time an agency for any other firm in the same line of business, an exception being made as to Odessa.

The show at Moscow took place, and the goods intended to be exhibited were forwarded to the plaintiffs and dealt with by them as they had undertaken. Large expenses were incurred by the plaintiffs in respect of the goods, as to which they had given the defendants notice that they would not incur any expense unless they were reimbursed by some means, the means suggested being their employment as agents for Russia for ten years. The plaintiffs, therefore, incurred expenses which are referable to their employment as agents for the exhibition at Moscow. Then was this evidence upon which the jury could properly find an assent by the plaintiffs to the terms of the letter of the 9th? It is insisted on the part of the defendants that the jury were not warranted in so finding. That argument consists of a disseverance of the letters of the 8th and 9th. But, looking at surrounding circumstances, there seems no reason to dissever the one from the other. On the contrary, there seems reason to connect them and to say that, according to their true constructions, they ought to be treated as one agreement. The letter of the 9th, leaving out any mention of Moscow, is another reason for supposing that the agency for Russia was considered by the defendants to conclude the whole matter. Moreover, when we find that the show at Moscow was connected by way of advertisement with that which was afterwards to be done by the plaintiffs as the defendants' agents in Russia, there appears, both by the correspondence and the nature of the transaction, sufficient reason for treating the whole as one transaction. Therefore there was a performance of that which was to be done by the plaintiffs, known to the defendants, which was evidence of an assent

to the terms contained in the letter of the 9th September, considered with reference to the terms contained in the letter of the 8th. So that, treating the letter of the 9th as a proposal by the defendants, there was evidence of an assent to it by the plaintiffs, and the jury have so found.

That being so in point of fact, how ought it to be dealt with in point of law? If the Statute of Frauds were out of the question, no inquiry would be made as to the precise time at which the different parts of the transaction took place. The question would be whether the whole was one transaction, and whether it contained an assent by the parties respectively to be bound by the same terms.

I have already stated that there was such an assent. But the Statute of Frauds introduces a new element into the discussion, because, in certain cases, it makes it necessary that the agreement, in order to be binding, should be proved by a writing under the hands of the person to be charged. The 4th section requires that this agreement, as it is not to be performed by either party within a year, should be in writing and signed by the party to be charged, namely, the defendants. Here there was no formal agreement inter partes, such as a conveyancer or an attorney would draw, but simply a proposal on the one side that the parties should be respectively bound by such and such terms, and an assent to that proposal stating the terms of the agreement. All difficulty with respect to the terms of the proposal is out of the case, because they were contained in a letter addressed to the plaintiffs and signed by the defendants, being the respective parties to the agreement. Therefore we have the names of the contracting parties, the terms of the contract restricting the agency to a particular business, a confined locality, and a certain time, by reference to the letter of the 8th, which reference is equivalent to a recital of the letter of the 8th in the letter of the 9th.

1866.
REUSS
v.
PICKSLEY.

Then the only question is, whether it is sufficient, to satisfy the 4th section of the Statute of Frauds, that the party to be charged has signed the proposed agreement, the other party not having then assented to the terms proposed but afterwards assenting to them. I apprehend that both upon reasoning and authority a proposal so signed and assented to does become a memorandum of an agreement within the 4th section of the Statute of Frauds.

By way of illustration, a variety of cases may be put, not depending on the Statute of Frauds. Two, however, will be sufficient. Under the Joint Stock Companies Act, 19 & 20 Vict. c. 47, it is necessary, in order to constitute membership, that there should be an acceptance of shares in writing under the hand of the allottee: (see Schedule Table B. (1.); and where a Company was only empowered to make calls upon shareholders, and a Court of equity could only make a person a contributory who had agreed in writing to be a shareholder, it was at first supposed that it was necessary that something should be done in writing by a member after the allotment of the shares to him. There is a case in the books that a person ought not to be held a member who proposed to take a certain number of shares, although fifty were allotted to him in consequence of his proposal, and although the proposal was in writing and signed by him, because he had not in writing consented to become a shareholder (*a*). But when that case came to be considered in the Court of Common Pleas, that Court said that it was a mistake to suppose that there was no acceptance in writing because the acceptance preceded the offer; and that the true mode of regarding transactions of that description was to consider, no matter how many moments of time intervened between each

(*a*) *The New Brunswick and Canada Land and Railway Company* v. *Muggeridge*, 4 H. & N. 160. 580.

transaction, whether all that took place did not constitute one transaction; and the Court decided that the acceptance was complete by a proposal in writing followed by an allotment assented to by the allottee (*a*). There the Court considered and unanimously acted upon the judgment of my brother *Blackburn* in the case of *Cusack* v. *Robinson* (*b*), in which it was held that an acceptance of goods under the 17th section of the Statute of Frauds might be prior to their delivery, and that it was not necessary that what was to bind as an assent should follow the delivery, but might precede it. It is a fallacy to suppose that because acts happen at various periods of time, whether it be at intervals of a day, or weeks, or months, they cannot in point of law be connected so as to constitute as much one transaction as if the parties were in a room together and the whole transaction had then passed between them face to face. That was the ground on which the Lord Keeper, in the case of *Coleman* v. *Upcot* (*c*), founded his decision that an offer in writing to sell an interest in land, accepted by parol, became binding as a contract upon the person who made the offer. There the Lord Keeper puts the case of two persons being in company, and one of them writing down a proposed agreement and signing it, and the other afterwards assenting to it, and preferring his bill for a specific performance; and that was treated by the Lord Keeper as a sufficient binding memorandum of an agreement within the Statute of Frauds.

I cannot say that case was followed, but the principle of it was assented to by Vice Chancellor *Kindersley* in the case of *Warner* v. *Wellington* (*d*). The Vice Chancellor,

(*a*) *The Bog Lead Mining Company* v. *Montague*, 10 C. B. N. S. 481.

(*b*) 1 B. & S. 299.

(*c*) 5 Vin. Abr. tit. "Contract and Agreement," 527, pl. 17.

(*d*) 3 Drew. 523.

1866.
REUSS v. PICKSLEY.

I suppose, observed the "nota bene" in Vin. Abr., that Mr. Colman did sign the agreement although not till three or four days after he had accepted it by parol; and therefore the learned Judge treated that case as not precisely in point to shew that a parol acceptance was sufficient, although the Lord Keeper's judgment certainly proceeded on that ground, and although Lord *St. Leonards*, in his work on Vendors and Purchasers (*a*), treats the case of *Coleman* v. *Upcot* as an authority to that effect. The case of *Warner* v. *Wellington* (*b*) was followed by *Smith* v. *Neale* (*c*) in the Court of Common Pleas, and was cited and acted upon in the Court of Exchequer in the case of *The Liverpool Borough Bank* v. *Eccles* (*d*).

So far with respect to agreements which must be mutual, but to which the statute requires only the hands of the party to be charged. But there are two classes of agreements to which reference may be made, and the law as to which may be usefully considered in determining the present question, and which fortify our decision with considerable authority. One is the class of cases in which a proposal is made which may or may not be acted upon, the party in whose favour it is made having an option whether he will or will not act upon the contract of the party to be charged. Such is the ordinary case of a guarantee, and that case is the more notable because it is within the very terms of the 4th section of the Statute of Frauds. The creditor may supply the goods or not as he thinks proper, but if he does supply them the surety is unquestionably bound, except in such cases as *Mozley* v. *Tinkler* (*e*), where, on the true construction of the guarantee, which was in the form of a letter from the defendant to

(*a*) P. 129, 14th ed.
(*b*) 3 Drew. 523.
(*c*) 2 C. B. N. S. 67.
(*d*) 4 H. & N. 139.
(*e*) 1 C. M. & R. 692.

the plaintiffs, it required an answer by way of assent before it could be acted upon. But even there, if the creditor had answered by assenting and supplied the goods, the guarantee would have been binding. That is a remarkable case because the surety having given a reference in effect said, "If you are satisfied as to my solvency, I am answerable." But it was not considered by any member of the Court that there ought to be an assent in writing. *Parke*, B., in his judgment, said that it was only necessary to have the signature of the party to be charged; and it was never suggested throughout the judgment that the creditor must assent in writing. Here, therefore, there is a singular confirmation, as appears to me, of our judgment in the present case, that the whole of the contract, in the sense of the whole of that which shews that both parties are bound, need not be in writing. If all the terms of the contract are in writing, and there is the signature of the party to be charged, that is enough.

It is said that such a decision will increase fraud and perjury, which the statute intended to prevent. I cannot agree to that, because, in the first place, a person, in order to enforce an agreement, must not only prove that the agreement was entered into, but also that he did on his part, or was ready to do until discharged, so much as would entitle him to receive the benefit under it. Next, if that argument is of any avail, it is also good to shew that not only a proposal assented to is not sufficient although signed by the party to be charged, but it is also good to shew that a legally drawn agreement signed by one party ought not to bind unless the other party is bound by it; because it may be said, "See how easily a person who has not signed may evade his agreement and insist upon the performance of the agreement by the party who has signed."

1866.
REUSS
v.
PICKSLEY.

That was considered in the case of *Laythoarp* v. *Bryant* (a), where, notwithstanding the doubt expressed by *Sir Thomas Plumer* in the case of *Martin* v. *Mitchell* (b), the Court held it sufficient that the party to be charged had signed. There it was pointed out in the course of the argument, that unless there is mutuality in the substance of the contract, the Court will not enforce it; but it does not follow that there must be mutuality in the signature.

The only other case to which I shall refer is where both parties must sign the contract, in order to make it effectual. That is the case of an ordinary lease for years, not under seal, which must be in writing and signed by both lessor and lessee. I am not speaking of leases under the statute 8 & 9 Vict. c. 106, s. 3, by which it appeared the legislature thought it beneficial that certain leases should be under seal; but I am speaking of leases affected by the Statute of Frauds, and in which, if signed by the lessee only and not the lessor, the lessee would take no interest, according to the case of *Soprani* v. *Skurro* (c). But suppose the lessee in such a case had signed before the lessor, every argument urged upon us to shew that no agreement had been signed would apply equally to that case, because no valid agreement would exist unless the other party signed. But would it make any difference whether the lessee or the lessor signed first?

Other instances might be produced, but it is sufficient to say that the law is clear. Regard must be had, not to the time when the one party or the other assented, but to the entire transaction, and if the assent amounts to a contract there is evidence to satisfy the 4th section of the Statute of Frauds, and an action is maintainable on the contract, although it is not signed by both parties.

(a) 2 Bing. N. C. 735. (b) 2 Jac. & W. 426, 427.
(c) Yelv. 18.

For these reasons we are all of opinion that the doctrine ıid down by *Kindersley*, V. C., is the true interpretation f the 4th section of the Statute of Frauds, which doctrine ı, in reality not new, but only a recapitulation of a contemoraneous exposition of the statute. The judgment of the Court will therefore be affirmed.

Judgment affirmed.

MEMORANDA.

In this Vacation Lord *Cranworth* resigned the Great Seal, and it was delivered to Lord *Chelmsford.*

Sir *Roundell Palmer* resigned his office of Her Majesty's Attorney General, and was succeeded by Sir *Hugh M'Calmont Cairns.*

Sir *Robert Porrett Collier* resigned his office of Her Majesty's Solicitor General, and was succeeded by *William Bovill,* Esq., one of Her Majesty's Counsel, who afterwards received the honour of Knighthood.

Sir *Frederick Pollock,* Knt., resigned his office of Chief Baron of the Exchequer, and was afterwards created a Baronet. He was succeeded by Sir *Fitzroy Edward Kelly,* one of Her Majesty's Counsel, who was previously called to the degree of the coif, and gave rings with the motto "Constantia."

Sir *James Lewis Knight Bruce* resigned, on account of ill-health, his office of Judge of the Court of Appeal in Chancery, and was succeeded by Sir *Hugh M'Calmont Cairns,* Her Majesty's Attorney General.

John Rolt, Esq., one of Her Majesty's Counsel, was appointed Her Majesty's Attorney General.

Exchequer Reports. 1866.

MICHAELMAS TERM, 30 VICT.

Rogers v. Roberts.

Nov. 24.

A debtor, whose goods had been taken in execution under a writ of fi. fa., before their sale, executed a composition deed under the 192nd section of the Bankruptcy Act, 1861, which was duly registered.—*Held*, that by the 198th section the execution was no longer available, and the Court ordered the sheriff to withdraw from possession.

THE plaintiff in this case, having obtained judgment against the defendant, issued a writ of fi. fa., under which the sheriff seized the defendant's goods. On the 15th of November, and whilst the sheriff remained in possession of the goods under the writ, a deed was made, under the Bankruptcy Act, 1861, between the defendant of the one part and the several persons who were his creditors of the other part, whereby the defendant covenanted to pay his creditors a composition of 2*s.* 6*d.* in the pound, by three instalments, at three, six, and nine months after the registration of the deed. The deed, which contained no assignment of the debtor's property, was executed by a majority in number, representing three-fourths in value of the creditors of the defendant, and was duly registered on the 16th November. The deed contained a covenant by the creditors not to sue, arrest, attach or take the defendant in execution for the amount of their debts. An advertisement of the deed was duly published in the London Gazette. The defendant obtained a certificate of the due registration of the deed and for the protection of himself and his goods.

The defendant took out a summons at Chambers calling

1866.
ROGERS v. ROBERTS.

on the plaintiff to shew cause why the sheriff should not withdraw from possession, and *Martin*, B., made an order accordingly, the plaintiff to be at liberty to apply to the Court.

Crompton Hutton now moved, upon an affidavit of the above facts, to rescind the order of *Martin*, B.—The question is whether the execution of a deed under the 192nd section of the Bankruptcy Act, 1861, is, by the operation of the 197th section, rendered equivalent to an adjudication in bankruptcy, so that the plaintiff, not having levied his execution by seizure and sale, is precluded by the 184th section of the Bankrupt Law Consolidation Act, 1849, from receiving more than a rateable part of his debt. [*Kelly*, C. B.—The 198th section of the Bankruptcy Act, 1861, says that after notice of the filing and registration of the deed no execution shall be *available* to any creditor; but if the sheriff proceeded to sell, this execution would be available.] That enactment has reference to a levy *after* the execution of the deed. [*Kelly*, C. B.—How do you distinguish this case from *Baersalman* v. *Langlands* (*a*) and *Marks* v. *Hall* (*b*)?] Those were cases of execution against the person, not the property of the debtor. Here the goods were bound by the execution, so that the plaintiff was no longer a creditor: *Giles* v. *Grover* (*c*). [*Pigott*, B. referred to *O'Brien* v. *Brodie* (*d*).] There the execution debtor had been adjudicated a bankrupt, so that the case was within the terms of the 184th section of the Bankrupt Law Consolidation Act, 1849. Here the deed contains no assignment of the debtor's property. The registration can only relate back to the date of the deed, and here the levy by seizure was before the execution of the deed.

(*a*) 3 H. & C. 433.
(*b*) 36 L. J. Q. B. 40.
(*c*) 1 Cl. & F. 72; 9 Bing. 128.
(*d*) *Ante*, p. 544.

KELLY, C. B.—I am of opinion that the order of my brother *Martin* was quite correct, and in strict conformity with the act of parliament. The 198th section of the Bankruptcy Act, 1861, says that "after notice of the filing and registration of such deed has been given as aforesaid"—and here that notice has been given—no "process against the debtor's property in respect of any debt, and no process against his person in respect of any debt &c. shall be available to any creditor." It is not disputed that, if this had been a process against the *person* (indeed the authorities are clear and uniform), the Court would have been bound to discharge the debtor out of custody, and so prevent the process from being any longer available to the creditor. *Baersalman* v. *Langlands* in this Court, and *Marks* v. *Hall* in the Court of Queen's Bench, are conclusive upon that point. The authority of those cases is not disputed, and it seems to me that in this respect it is impossible to distinguish between process against the property and process against the person of the debtor. The words of the act of parliament which relate to process against the property and those which relate to process against the person are actually identical, and the remedy and duty of the Court is in each case the same. Under these circumstances I am of opinion that the order of my brother *Martin* was right, and the rule must be refused.

MARTIN, B.—I am of the same opinion. The real question is, what is the meaning of the word "available" in the 198th section of the Bankruptcy Act, 1861? Now if we look, not merely at this section, but at the previous sections, they shew how the legislature has dealt with evils on both sides. The law used to be that if the creditor was diligent in the prosecution of his claim the law would protect him. Of late, the legislature seems to have taken a different view,

1866.
ROGERS v. ROBERTS.

and sought to prevent the evil of one creditor sweeping away the whole of the debtor's property. On the other hand, formerly debtors were living in prison in the enjoyment of their property while their creditors got nothing. Those were two conflicting evils, and I have no doubt that the meaning of the word "available" is that stated by the Lord Chief Baron. An instance of the other evil lately came before me. Property had been seized under an execution, and the sale was advertised for a particular day. An application was then made to me, under an interpleader order, to postpone the sale for a week, as the property would produce double what it would under a forced sale. All parties were desirous to get the utmost value for it, but the fear of a bankruptcy occurring in the interval compelled the creditor to insist on his right to sell, and the property was sold at a sacrifice of 3000*l.*

BRAMWELL, B.—I have no doubt that the construction put upon this Act by the Lord Chief Baron is correct, viz., that the execution shall be no longer "available." The language of the 198th section is too clear to admit of argument.

PIGOTT, B.—I am of the same opinion. I think that the language of the Act is too plain to admit of any mistake in construing it. I can well understand the policy of the law in preventing one creditor from getting all the debtor's goods, and depriving the others of any advantage. There are, however, cases where composition deeds are only made to protect the property of fraudulent debtors.

Rule refused.

1866.

TETLEY AND OTHERS *v.* WANDLESS.

Nov. 16.

To a declaration in an action commenced on the 24th April, 1866, the defendant pleaded that, on the 7th May, 1866, a deed was made under the Bankruptcy Act, 1861, between the defendant of the first part, a surety of the second part, and the several persons creditors of the defendant (not only those whose names and seals were thereunto subscribed and set, but *also all other the creditors of the defendant*) of the third part: whereby, after reciting that the defendant was indebted to the *said several creditors in the several sums of money set opposite to their respective names in the schedule thereunto*, and that it had been agreed, by the statutory majority of creditors, to accept the composition and security therein expressed in satisfaction *of such respective debts*: in consideration of the promissory notes of the defendant and the surety for payment *to the said respective creditors* of the composition of 5*s.* in the pound *on the respective sums of money aforesaid*, the creditors of the defendant, *parties thereto of the third part*, released the defendant, and accepted the composition in satisfaction of the debts owing to them by the defendant *specified in the schedule*. And the defendant and his surety covenanted with *each and every of the creditors parties thereto of the third part* to pay to them the composition and deliver the promissory notes.

Held.—First: that the release was absolute, and that it was not necessary to aver or prove a tender of the composition or promissory notes.

Secondly: that the deed was not bad on the ground of inequality in the rights of the creditors; for, according to the true construction of the deed, not only the creditors named in the schedule but the whole body of creditors were entitled to the benefit of it.

Thirdly: that the plea ought to have been pleaded in bar of the further maintenance of the action, and that in such form it would operate, by virtue of the release, as a bar, not only to the debt, but also to damages and costs.—So held in the Exchequer Chamber, affirming the judgment of the Court of Exchequer.

THIS action was commenced on the 24th of April, 1866. The declaration was for goods sold and delivered, &c.

Plea.—That after the accruing of the plaintiffs' claim, and after the 11th October, 1861, the defendant then being a debtor within the true intent and meaning of the Bankruptcy Act, 1861, and indebted to divers persons, a deed, bearing date the 7th May, 1866, was made and entered into between the defendant of the first part, J. Dobbing of the second part, and the several persons respectively creditors of the defendant, or the authorised agents of such creditors (not only those whose names and seals were thereunto subscribed and set, *but also all others the creditors of the defendant*), of the third part; and that the said deed related to the debts and liabilities of the defendant, and his release therefrom, and was in all respects a composition deed within the true intent and meaning

1866.
TETLEY v. WANDLESS.

and provisions of the Bankruptcy Act, 1861. And by the said deed, after reciting that the defendant was indebted to *the said several creditors in the several sums of money set opposite to their several and respective names in the schedule thereunder written* (over and above the balance of the securities by them, or any of them, respectively held); and it was agreed, by a majority in number of the said several creditors representing three fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards, to accept the composition and security therein expressed in full satisfaction *of such respective debts*, it was witnessed that, in pursuance of the said agreement, and in consideration of the joint and several promissory notes of the defendant and the said J. Dobbing, for payment *to the said respective creditors* of the defendant of the composition of 5*s.* in the pound *on the respective sums of money as aforesaid*, dated the 27th of April then last past, payable *to the respective creditors* of the defendant four months after the date thereof respectively, they *the said creditors* of the defendant, *parties thereto of the third part*, for themselves and their several and respective partners, &c., did, and each of them did for himself, his heirs, &c. (but so far only as related to the acts of himself, his executors, &c., and partners), to the intent that these presents should be valid, effectual and binding on *all the creditors of the defendant* pursuant to the provisions of the Bankruptcy Act, 1861, thereby release unto the defendant, his heirs, &c., all actions, suits, debts, claims and demands which the creditors of the defendant, and their several and respective partners, or any or either of them, had or had had against the defendant, and did thereby accept the *said composition so payable as aforesaid* in full satisfaction and discharge of their several debts and sums of money due and owing to them by the

defendant, *specified in the said schedule.* And they the creditors of the defendant, parties thereunto of the third part, did also for themselves and their several and respective partners, and each of them did for himself, his heirs, &c., covenant with the defendant, that it should be lawful for the defendant, his heirs, &c., to plead these presents in bar of every action or suit which might thereafter be brought against the defendant *by any of his creditors parties thereto of the third part.* Provided always, that neither these presents, nor anything therein contained, should be construed to invalidate or in any manner affect any mortgage, charge, lien or other specific security of any debt or sum of money due or owing by the defendant. And each of them, the defendant, and the said J. Dobbing, for himself, his heirs, &c., did thereby covenant with each and every of the creditors of the defendant, parties thereto of the third part, that they, the defendant and the said J. Dobbing, or one of them, should and would pay *to each and every of the creditors* of the defendant *5s.* in the pound *upon their respective debts as aforesaid,* at or immediately after the execution of these presents by the said majority of his said creditors as aforesaid; and that each of them, the defendant and the said J. Dobbing, their executors, &c., should and would make and deliver *to each and every of the creditors* of the defendant, upon demand, at or immediately after the execution of these presents by the said majority of the said creditors as aforesaid, the said promissory notes; and that they, the defendant and the said J. Dobbing, or one of them, their or his executors, &c., would pay the said promissory notes for the payment of the said composition of *5s.* in the pound as and when the same should become due and payable.—The plea contained averments of the due execution of the deed by the statutory majority in number and value of the creditors;

1866.
TETLEY v. WANDLESS.

and by the defendant and the said J. Dobbing; of its registration within twenty-eight days after its execution, and of the performance of all the other conditions required by the statute to render the deed valid and binding on non-assenting creditors.

Issue thereon.

At the trial, before *Lush*, J., at the Carlisle Summer Assizes, 1866, it was proved that the plaintiffs had never executed or assented to the deed; and that their debt was not in the schedule. There was no evidence that any tender had been made to them of the promissory notes or composition. The statutory requisitions had been complied with.

It was contended, on the part of the plaintiffs, that the plea was not proved, on the grounds, first, that it was a plea in bar of the action generally, and not of its further maintenance; secondly, that there was no proof of a tender of the composition. The learned Judge directed a verdict for the defendant, reserving leave to the plaintiffs to move to enter the verdict for them; the Court to be at liberty to amend the pleadings on such terms as they might think fit.

Kemplay, in the present Term, obtained a rule nisi accordingly, or to enter judgment for the plaintiffs non obstante veredicto, on the grounds, first, that the deed did not release the plaintiffs' debt, it not being a scheduled debt: secondly, that the provisions of the deed were unequal, the giving of the promissory notes being confined to the creditors whose debts were scheduled: thirdly, that the plea was bad for not averring a tender of the composition.

Manisty (with whom was *Lewers*) now shewed cause.—First, the plea is not a plea in bar of the action generally,

but of its further maintenance. By the 68th section of the Common Law Procedure Act, 1852, "any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal commencement or conclusion; and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action." This plea shews that the defence arose after action, for it states that the composition deed was made on the 7th May, 1866, and it appears by the record that the action was commenced on the 24th April. [*Bramwell*, B.—The objection is, not that the plea does not shew that the subject-matter arose after the commencement of the action, but that the plea, shewing that it then arose, is not pleaded in bar of the further maintenance of the action.] It is sufficient if the plea discloses on the face of it that the defence arose after action; if it be ambiguous, or calculated to embarrass the plaintiff, he should apply to a Judge to rectify it: *Brooks* v. *Jennings* (*a*). [*Bramwell*, B.—If it turned out that the deed was made on the 6th of April, would that be a variance? The date is no part of a deed.] Here the date is material with reference to the registration of the deed; for it is averred that the deed was registered within twenty-eight days after its execution.

Secondly, it is objected that there was no proof of a tender of the composition money. But, assuming that it was necessary to aver a tender, there is a sufficient averment of it, and the tender is not put in issue by the replication. The 57th section of the Common Law Procedure Act, 1852, enables a plaintiff or defendant to aver performance of conditions precedent generally, but provides that the opposite party shall not deny such averment generally, but shall specify in his pleading the condition precedent he

(*a*) 1 Har. & R. 414.

1866.
TETLEY v. WANDLESS.

intends to dispute. So that here the general averment that all things were done, &c., necessary to make the deed binding, includes a tender, and if the plaintiff meant to rely on the want of it he should have specifically denied it. [*Bramwell*, B.—Where a pleading contains a general averment that all things necessary have happened, &c., the other party cannot reply that all things have not happened, &c.; but do not the 77th, 78th and 79th sections enable him, by a general denial, to put in issue all matters alleged in the previous pleading?] In this case it was not necessary to aver a tender of the composition money, because the release is absolute and the covenant to pay an independent covenant: *Johnson* v. *Barratt* (*a*).

Thirdly, with respect to entering the judgment for the plaintiffs non obstante veredicto. The deed is made, not only between the defendant and those creditors whose names and seals are thereunto subscribed, but also *all other the creditors of the defendant;* and the release operates as a release by all. The provisions of the deed are not unequal, because the covenant is to pay the composition and deliver the promissory notes to "each and every of the creditors of the defendant."

Kemplay, in support of the rule.—First, this is a plea in bar of the action generally. It is conceded that no formal commencement is necessary, if it appears by the plea that it is only in bar of the further maintenance of the action. But where matter of defence arises after action brought, the plaintiff is entitled to his costs up to the time of pleading it, and the plea does not afford a complete defence unless it is pleaded, not only to the debt, but also to the damages and costs: *Nosotti* v. *Page* (*b*), *Thame* v. *Boast* (*c*), *Cook*

(*a*) *Ante*, p. 16. (*b*) 10 C. B. 643.
(*c*) 12 Q. B. 808.

v. *Hopewell* (*a*). [*Kelly*, C. B.—The Court are of opinion that the plea in its present form is not good, but the defendant may amend it on payment of costs up to the time it was pleaded (*b*).] The amendment ought not to be allowed, inasmuch as the plea in its amended form is bad, since it is an answer to the debt only and not to the damages. The release cannot apply to damages and costs of an action commenced before the deed was made.

Secondly, a tender of the composition money ought to have been averred and proved. It is conceded that where there is an absolute release of the debts, and a covenant to pay the composition money, a tender is not necessary. In *Johnson* v. *Barratt* (*c*) the release was in consideration of the covenants; but here the release is in consideration of the promissory notes, and it does not take effect unless the notes are tendered; *Dingwall* v. *Edwards* (*d*). The want of an averment of tender is not cured by the general averment of performance of all conditions precedent: *Fessard* v. *Mugnier* (*e*).

Thirdly, the deed is void on the ground of inequality. Although the deed in its commencement applies to all the creditors, the recitals limit its operation to the creditors named in the schedule. Then the release is "in consideration of the joint and several promissory notes of the defendant and J. Dobbing for payment to the said respective creditors of the defendant of the composition of 5*s*. in the pound on the respective sums of money as aforesaid," that is, the sums opposite the names of the creditors in the schedule. The surety is only bound to give promissory

(*a*) 11 Exch. 555.

(*b*) The plea was then amended by adding the formal words "and after the commencement of this suit" at the beginning of the plea, and by pleading it in bar of the further maintenance of the action.

(*c*) *Ante*, p. 16.

(*d*) 4 B. & S. 738.

(*e*) 18 C. B. N. S 286.

1866.
TETLEY v. WANDLESS.

notes in respect of the debts mentioned in the schedule: *Buvelot* v. *Mills* (*a*); and non-assenting creditors cannot obtain the composition by enforcing the covenant. [*Kelly*, C. B.—The covenant is to pay the composition and deliver the promissory notes to "each and every of the creditors."] But only "upon their respective debts as aforesaid;" and the words "as aforesaid" refer to the debts set opposite the names of the creditors in the schedule.—He also cited *Hickmott* v. *Simmonds* (*b*).

KELLY, C. B.—I am of opinion that the rule ought to be discharged. There are two questions, both relating to the validity of this deed as a deed of composition under the Bankruptcy Act, 1861.

The first question is, whether the release contained in the deed is absolute and unconditional, or only takes effect upon the delivery of the promissory notes. I am of opinion that the release is absolute and unconditional, and at once puts an end to the plaintiffs' right to maintain this action. The deed is made between the defendant, and not only those creditors who execute it, but also all his other creditors. After reciting that the defendant was indebted to his several creditors in the sums set opposite to their names in the schedule, the deed proceeds to recite that it was agreed by the statutory majority in number and value of creditors to accept a composition in satisfaction of *their respective debts*. Then, in consideration of the promissory notes for payment of the composition "on the respective sums of money as aforesaid," that is, the sums of money set opposite the names of the creditors in the schedule, the creditors parties of the third part release their debts. Therefore, if this were a parol contract, and the question

(*a*) 6 B. & S. 986. (*b*) 35 L. J. Chan. 580.

was whether the consideration was co-extensive with the promise, the answer would be that the benefit was confined to the creditors named in the schedule, and did not extend to the whole body of creditors. But this being a deed under seal no consideration is necessary, and although a consideration is averred, and may be insufficient to support a parol agreement, it will not avoid the deed unless the consideration is illegal. Then, laying aside the consideration, there is an absolute and unconditional release of all the debts due to the whole body of creditors; and the release, not being subject to any condition as to tender of the promissory notes or payment of the composition, is a complete bar to this action, and consequently the first objection fails.

But there is another objection, which at first I thought of more weight. I agree that if the effect of the whole deed was that the creditors named in the schedule should alone have the benefit of the composition, the deed would be invalid under the Bankruptcy Act, 1861, by reason of inequality. But taking the whole deed together it contains a covenant by, and imposes an obligation on, the debtor and his surety to pay the composition and deliver the promissory notes to *all* the creditors. The deed is therefore valid and binding on all the creditors. It is true that if our attention is confined to the consideration clause the delivery of the promissory notes would apply only to the creditors named in the schedule. But the covenant by the defendant and his surety is with "each and every of the creditors of the defendant, parties thereto of the third part." That gives them a right in equity, and probably in law, to the benefit of the covenant. It has been contended that as the covenant is to pay the composition after the execution by "the majority of the creditors as aforesaid," the words "as aforesaid" limit the effect of the covenant

1866.
TETLEY v. WANDLESS.

to the creditors named in the schedule. But such a construction would be repugnant to the tenor of the deed. We should rather refer the words "as aforesaid" to the creditors parties to the deed of the third part, that is, "not only those whose names and seals were thereunto subscribed and set, but also all others the creditors of the defendant."

Therefore, every objection fails. The release being absolute no tender is necessary; and the deed is not bad on the ground of inequality, because the covenant is to pay the composition to the whole body of creditors. Under these circumstances, the plea having been amended, the rule must be discharged.

BRAMWELL, B.—I am of the same opinion. I think an amendment was necessary, because the plea in effect stated that the deed was made before action brought, whereas it was not made until afterwards. Then, the amendment having been made, the question is whether the plea is proved. I think it is. This is a deed in which the defendant covenants with *all* his creditors, and which contains an absolute release, so that it is not necessary to aver or prove a tender of the composition money.

It was contended that the amendment ought not to be allowed if it would render the plea bad. I agree with that proposition, and no doubt there are cases in which it has been so decided, but I cannot see on what ground the plea would be bad. It is argued that it should be limited to the debt, and not pleaded to the costs; but the same argument would apply to an ordinary release, which is a discharge, not only of the debt, but also of all damages which accrued by reason of its nonpayment. In my opinion the plea, as amended, is a good plea in bar of both debt and costs.

CHANNELL, B.—I also think that the defendant is entitled to judgment. One ground on which a new trial is sought for is that the plea was not proved. Whatever might have been the weight of that objection if no amendment had been made, I think that the plea in its amended form was proved, and consequently the objection fails.

The other ground for a new trial involves a question substantially the same as one which arises on the rule to enter judgment for the plaintiffs non obstante veredicto. The first point is whether the release is absolute or conditional. The plaintiffs have not executed the deed, and therefore, to be binding as against them, it must operate by force of the statute. This question must be considered apart from that of inequality. Without repeating the reasons given by the Lord Chief Baron, I think the release must be treated as absolute and unconditional. The deed professes to be made with *all* the creditors. It is true that it recites that the defendant is indebted to the "said several creditors in the several sums of money set opposite to their several and respective names in the schedule hereunder written;" and it proceeds to recite that it was agreed by a majority in number of "the said several creditors" to accept a composition. Now, it is admitted that the description of the parties to the deed includes *all* the creditors, but it is contended that the words "said several creditors" must refer to the scheduled creditors only. I do not agree with that construction. Although those words may apply to the immediate antecedent, there is no arbitrary rule of law binding the Court to that construction. I am fortified in this opinion by the decision of the House of Lords, in the case of *The Eastern Counties Railway Company* v. *Marriage* (*a*), that there is no rule of law, or of grammatical

(*a*) 9 H. L. 32.

1866.
TETLEY v. WANDLESS.

construction, that the words "said" or "as aforesaid" must necessarily refer to the immediate antecedent. Looking at the whole instrument, I am of opinion that the covenant is to give the promissory notes and pay the composition to *all* the creditors.

The question remains, whether, assuming this an absolute release, the deed is void on the ground of inequality. I am of opinion that there is no inequality. The covenant is to pay all the creditors, whether assenting or not, a composition of 5*s.* in the pound.

PIGOTT, B.—I am of the same opinion. This is a deed between the debtor and all his creditors, and, although it may be open to some grammatical criticism, the covenant is to deliver the promissory notes and pay the composition to all the creditors, and then all the creditors release. Under such a deed there is no necessity for a tender of the promissory notes or the composition, nor does the Bankruptcy Act, 1861, require it. In my judgment, there is no inequality in the deed. I agree with the rest of the Court on all the points, and that the defendant is entitled to judgment.

Rule discharged.

The plaintiffs having appealed against this decision, the case was argued, in the following Easter Vacation (*a*), by *Kemplay*, for the plaintiffs.—The argument was in substance the same as that in the Court below. In support of the objection to the form of the plea, the following additional

(*a*) May 20. Before *Willes*, J., *Byles*, J., *Blackburn*, J., *Keating*, J., *Montagu Smith*, J., and *Shee*, J.

authorities were cited: *Goodwin* v. *Cremer* (*a*), *Cook* v. *Hopewell* (*b*), *Kemp* v. *Balls* (*c*), *Henry* v. *Earl* (*d*).

Manisty (with whom was *Lewers*) appeared for the defendants, but was not called upon to argue.

WILLES, J.—We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed.

It is contended that the deed is not valid within the Bankruptcy Act, 1861, because all the creditors have not equal rights under it. The deed purports to be made between the debtor of the first part, his surety of the second part, and *all his creditors*, whether they executed it or not, of the third part. It proceeds to recite, erroneously, that the debts of the "said several creditors" were inserted in the schedule (for we must assume that the recital is to be read as a general recital that the debts of *all* the creditors were inserted in the schedule), and that the statutory majority of creditors agreed to accept a composition and security in satisfaction of their respective debts. The deed then sets forth a release, in the most general terms, by the parties of the third part, that is, *all* the creditors, of all actions, suits, claims and demands against the debtor. The deed also contains a covenant by the debtor and his surety "with each and every of the creditors of the defendant, parties thereto of the third part," to pay a composition of 5*s.* in the pound, and give promissory notes as a security for it, in consideration of which the debtor is released by the creditors of the third part.

It is said that we ought to read the words "their said respective debts," and similar expressions in the deed, as restrictive of the general description of "all the creditors,

(*a*) 18 Q. B. 757.
(*b*) 11 Exch. 555.
(*c*) 10 Exch. 607.
(*d*) 8 M. & W. 228.

1866.
TETLEY v. WANDLESS.

parties of the third part," and as confining the description to the creditors whose debts are mentioned in the schedule, and giving them only rights under the deed. If we did so, we should be putting a very narrow construction on the deed, and giving effect to a mistaken description, inapplicable to the whole body of creditors, and which ought rather to be rejected than read as a restriction. If, indeed, it could be so read consistently with the whole scope and without destroying the effect of the deed, which was manifestly intended to operate as a satisfaction and discharge as regards *all* the creditors, and a release by *all* of the debtor, it ought no doubt to be so read. But we think it cannot be. Applying the maxim "ex antecedentibus et consequentibus fit optima interpretatio," the just interpretation of the deed is that which has been put upon it by the Court of Exchequer, and, reading the latter and earlier parts of the deed together, it is clear that it applies to *all* the creditors, and operates as a release by *all*. That point therefore fails.

Another objection is that, as the deed was made after the action was commenced, the effect of the release is to discharge the claim to the debt only, leaving the plaintiffs a right to proceed with the action, and sign judgment for nominal damages, to which the law will annex costs. We must, according to the authority of *Mellish* v. *Richardson* (a), read the plea as amended, and, so reading it, it states that, after the commencement of the action, a deed of composition was made under the Bankruptcy Act, 1861, which released the defendant from the debt. This deed is commendable in not adopting the voluminous language which at one time crept into conveyancing, by which some dozen words were used to express that which this deed briefly expresses by saying that the creditors, parties thereto of the third part,

(a) 1 Cl. & Fl. 224.

released unto the defendant all actions, suits, debts, claims and demands, and accepted the composition in full satisfaction and discharge of their several debts; and that the deed may be pleaded in bar of every action or suit which might thereafter be brought against the defendant by any of his creditors.

If judgment had been obtained before the release, a technical point might have been raised whether or not *executions* were included in the release. According to the authority of Co. Litt. sect. 507 (*a*), it might seem to follow that the release ought to be framed so as to shew that it was intended to bar executions. But by the next section (*b*) it appears that the best form of release is that which is contained in this deed.

Then ex concessis the claim to the debt is barred, and the right to maintain an action in respect of it is also gone. But according to the argument of the plaintiffs' counsel, something different from the original demand, and inconsistent with it, still remains. It is contended that the ancillary claim to a farthing in respect of nominal damages survived the principal claim, which is barred, and so enables the plaintiffs to continue the action. But that is not, in my opinion, reconcilable with common sense or the language of the authorities referred to; neither, in fact, was this point dealt with in those cases. The observations of Lord *Abinger*, C. B., in *Henry* v. *Earl*, as to the necessity of the

(*a*) Co. Litt. sect. 507: — "But where a man recovereth debt or damages, and it is agreed between them that the plaintiff shall not sue execution, then it behoveth that the plaintiff make a release to him of all manner of executions."

(*b*) Sect. 508 —Also if a man release to another all manner of demands, this is the best release to him to whom the release is made that he can have, and shall enure most to his advantage. For by such release all manner of demands, all manner of actions, reals, personals, and actions of appeal are taken away and extinct, and all manner of executions are taken away and extinct.

1866.
TETLEY
v.
WANDLESS.

subject-matter of the plea being an answer to costs, are not satisfactory. That case, and the others which were cited, were cases in which *payment* was pleaded; and it may be a question on the evidence what it was in respect of which the parties agreed that payment should be a discharge. If it was in respect of the debt only, damages for its detention might be recovered. We should have thought that in *Henry* v. *Earl* it would have been better to have adopted the view of *Maule*, J., in *Beaumont* v. *Greathead* (*a*), that if a creditor is paid the full amount of his debt it must be assumed that the payment was in satisfaction and discharge, not only of the debt, but also of nominal damages for its detention. Moreover *Henry* v. *Earl* is not reconcilable with *Corbett* v. *Swinburne* (*b*). It may be a question for the jury whether a man accepting payment of a bill of exchange as in *Godwin* v. *Cremer* (*c*) is bound to accept it as an entire discharge, since there might be a reason for keeping the bill to enforce against other parties to it his remedy for costs. So, a question of fact might arise whether the payment, though nominally in satisfaction of the debt, was really on account of it only. In this case, however, we are dealing with a release of all "actions, suits, debts, claims and demands," and we are all agreed that such a release of a debt comprises a release of all its accessories.

As no authority has been cited the other way, it may be proper to refer particularly to the case of *Vansandau* v. *Corsbie* (*d*), in which the effect of a certificate in bankruptcy was considered. The principal debt was discharged, accessory costs had accrued, and damages had been sustained in a collateral proceeding. It was insisted by the plaintiff that he was entitled to recover in respect of them, because

(*a*) 2 C. B. 494.
(*b*) 8 A. & E. 673.
(*c*) 18 Q. B. 757.
(*d*) 3 B. & Ald. 13.

the debt only was discharged by the certificate, but the Court put the certificate of bankruptcy on the footing of a release, and held it a discharge of all the incidents and accessories of the original debt.

It seems therefore, without any further reasoning upon it, that this release not only barred the debt and right of action but also any possible—(we cannot say *inchoate*, for there was no inchoate)—chance of recovering costs, on the ground that the release did not affect them.

For these reasons the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

THOMPSON AND ANOTHER *v.* KNIGHT.

Nov. 22.

A deed, under the Bankruptcy Act, 1861, by which the statutory majority of creditors agreed to accept a composition of 10*s.* in the pound, payable by instalments at the end of two, four and six months, contained a clause empowering a trustee, in his discretion, to pay in one sum, and at such time or times as he should think fit, any creditor whose composition did not exceed 10*l.*—*Held*, that this provision created an inequality in the rights of the creditors, and consequently the deed was void.

DECLARATION on an order of the defendant for payment of 73*l.* 15*s.* to the plaintiffs.

Plea.—That after the accruing of the plaintiffs' claim a deed was made, under the Bankruptcy Act, 1861, between the defendant of the first part, the several persons and firms, creditors of the defendant of the second part, and E. Bartlett of the third part; whereby, after reciting that the statutory majority of creditors had agreed to accept a composition of 10*s.* in the pound, to be paid by three equal instalments, payable respectively at the end of two, four and six months from the date thereof, and secured by promissory notes of the defendant, payable at such dates respectively, the defendant covenanted with the said E. Bartlett to pay weekly into the Naval Bank at Plymouth,

1866.
THOMPSON v. KNIGHT.

to the credit of an account to be opened for that purpose, the sum of 40*l.* until the amount of money so paid in should be sufficient to satisfy the aggregate amount of the composition of 10*s.* in the pound, and all costs and expenses incurred by the said E. Bartlett in carrying the deed into effect. And after further reciting that the defendant had, previously to the execution thereof, delivered to the said creditors respectively the promissory notes for the amount of the instalments of their respective debts, the defendant covenanted to pay the sum of 40*l.* weekly to the credit of the account of the said E. Bartlett until enough had been so paid to satisfy the aggregate amount of the composition, upon trust to provide for the promissory notes given by the debtor to his creditors when they should become due, and to pay all the creditors their composition of 10*s.* in the pound: Provided that in cases where the amount of composition payable to any creditors should not exceed 10*l.*, the said E. Bartlett, his executors, &c., should be at liberty, if he or they should think fit, to pay the same in one sum at such time or times as he or they should think fit.—The deed also contained the usual averments of performance of all the statutory conditions necessary to render the deed valid and binding on all the creditors.

Demurrer, and joinder therein.

H. T. Cole, in support of the demurrer.—The deed is void on the ground that the creditors have not equal rights under it. Where the composition payable to any creditor does not exceed 10*l.*, the trustee may pay such creditor the whole amount at any time: so that a creditor whose debt does not exceed 20*l.* might immediately obtain the whole composition, whereas a creditor whose debt exceeds 20*l.* could only get the composition by instalments, and would not receive the whole until the expiration of six

months from the date of the deed. This case is within the principle of the decision in *Leigh* v. *Pendlebury* (*a*), where it was held that a clause empowering the trustee to pay in full all creditors whose debts did not amount to 10*l.* was unreasonable.—He also referred to *Woods* v. *Foote* (*b*).

R. E. Turner, in support of the plea.—In *Leigh* v. *Pendlebury* the trustee was empowered to pay certain creditors *in full;* so that there was an inequality in the distribution of the property among the whole body of creditors. Here, however, there is no substantial inequality. No creditor can obtain more than the amount of the composition. It is true that a certain class may obtain it at once instead of by instalments; but in distributing the assets it may be a convenience to discharge at once small claims. Besides, the trustees are not absolutely bound to pay those creditors at once, but have only a discretionary power; and it must be assumed that they will exercise their discretion so as not to prejudice the rest of the creditors. In *Coles* v. *Turner* (*c*) a clause giving trustees full discretion to pay dividends at such place and in such manner as they should think fit was held not unreasonable. Moreover, it does not appear that there are any creditors whose amount of composition would not exceed 10*l.* If so, that should have been shewn by way of replication. [*Kelly*, C. B.—We must rather presume that there are until the contrary is shewn.]—He also cited *Keyes* v. *Elkins* (*d*).]

H. T. Cole was not called upon to reply.

KELLY, C. B.—I am of opinion that the plea is bad.

(*a*) 15 C. B. N. S. 815.
(*b*) 1 H. & C. 841.
(*c*) 1 Har. & R. 386.
(*d*) 5 B. & S. 240.

1866.
THOMPSON v. KNIGHT.

It is essential to the validity of a deed of this nature that all the creditors should be on an equal footing; and when we consider that a large proportion of creditors may not only have never executed, but even assented to, the deed, but are nevertheless bound by it, it certainly appears just and equitable that they should have equal rights under it.

Now, this deed contains a clause which empowers the trustee, if he thinks fit, at any time (that is, immediately on the execution of the deed) to pay the composition in one sum to any creditor whose debt does not exceed 20*l.* It does not appear whether there are any such creditors, but if we are at liberty to presume one way or the other we must presume that there are, otherwise the clause would not have been inserted. But, however that may be, a power is given to pay in one sum a certain class of creditors the half of their respective debts; and by such payment the whole fund might possibly be exhausted, so no other creditor could be paid any part of the composition. Under such circumstances it cannot be said that all the creditors are in an equal position. Possibly, where the debts are small, and there are sureties who are persons of property, no mischief would happen, and practically it might be convenient at once to pay small creditors their composition in full. Still that would depend on the amount of debts and assets, and the number of that class of creditors. In considering whether this clause is unreasonable it is enough to say that, if carried into effect, it would create an inequality among the whole body of creditors; and consequently there must be judgment for the plaintiffs.

CHANNELL, B.—I am also of opinion that the plaintiffs are entitled to judgment. It is clear that if this provision is carried out by the trustee some inequality will result. Suppose the deed had absolutely provided that a composi-

tion of 10*s.* in the pound should be paid by three instalments to creditors whose debts exceeded 20*L*, and by one instalment to creditors whose debts did not exceed 20*L*, that would certainly have placed one class of creditors in a different position from the other. It is true that the provision in this deed is not absolute, but only gives the trustee a discretionary power; but in my judgment that makes no difference.

The case of *Keyes* v. *Elkins* (*a*), which has been referred to, does not appear to me to throw any light on this question. The principal point there argued was whether a particular clause was a release, or only a covenant not to sue; and it was contended that, assuming the clause to be a release in terms, it could not operate as such because the deed contained a reservation of the rights of creditors against sureties. The Court, however, held that the clause might nevertheless operate as a release; and *Cockburn*, C. J., said: "To make the deed unreasonable on the ground of inequality between the creditors, there must be some *substantial* inequality." In that case I can well understand the Court holding that there was no substantial inequality, but in this case the provision, if carried out, would produce a substantial inequality.

PIGOTT, B., concurred.

Judgment for the plaintiffs.

(*a*) 5 B. & S. 240. 253.

1866.

Nov. 14.

HUFFER *v.* ALLEN and Another.

A declaration stated that A. issued against B. a writ of summons, specially indorsed for 28*l.*: that B. paid A. 10*l.* on account: that A. afterwards maliciously, and without reasonable or probable cause, signed judgment for default of appearance, for 28*l.*, and arrested the defendant under a ca. sa. for that amount, and compelled him, in order to obtain his discharge, to pay 35*l.* On demurrer to the declaration:—*Held*, that the action was not maintainable, inasmuch as the judgment operated as an estoppel, and precluded the plaintiff from averring that 28*l.* was not due.

The proper course would have been to apply to the Court or a Judge to reduce the judgment to the amount actually due.

DECLARATION.—That the plaintiff was indebted to the defendants in the sum of 28*l.* 0*s.* 9*d.*, and the defendants commenced an action against the plaintiff in the Court of Queen's Bench for the recovery of the said debt, by issuing a writ of summons against the plaintiff, specially indorsed, according to the Common Law Procedure Act, 1852, for 28*l.* 0*s.* 9*d.*, and caused the plaintiff to be served therewith; and thereupon, and before appearance was entered, and before judgment was signed, the plaintiff paid the defendants, and the defendants accepted and received from the plaintiff, the sum of 10*l.* on account of the said debt, and after such payment and receipt the defendants wrongfully and maliciously, and without any reasonable or probable cause, caused and procured judgment to be signed in the said action against the plaintiff, for default of appearance, for the full amount of the debt of 28*l.* 0*s.* 9*d.* and 4*l.* costs (as appears by the record of the said judgment now in the said Court), without giving credit or making any allowance or deduction for or in respect of the said sum of 10*l.* so paid as aforesaid, the said 28*l.* 0*s.* 9*d.* being the whole amount of the said debt for the recovery of which the action was brought as aforesaid, and the said 4*l.* being the full amount of costs to which the now defendants would be and were by law entitled; and thereby the now defendants wrongfully and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said judgment to be signed for the recovery of a debt wherein

he sum recovered exceeded 20*l.* exclusive of costs; and he now defendants wrongfully and maliciously, and without reasonable or probable cause whatsoever, caused and procured a writ of ca. sa. to be issued out of the Court of Queen's Bench in the said action upon the said judgment, directed to the sheriff of Worcestershire, commanding him to take the now plaintiff to satisfy the said debt of 28*l.* 0*s.* 9*d.* and 4*l.* costs, together with interest, &c. And the now defendants wrongfully, &c., caused and procured the said writ of ca. sa. to be indorsed to satisfy 32*l.* 0*s.* 9*d.*, and 1*l.* 8*s.* costs of execution and interest, &c., and caused and procured the said writ so indorsed to be delivered to the said sheriff to be executed. And the now defendants afterwards wrongfully, &c., caused and procured the said sheriff, under the said writ, to arrest the now plaintiff and detain him, and the now plaintiff was detained in custody under the said writ for a long time, and until the plaintiff was compelled by the defendants, in order to procure his discharge from such custody, to pay 35*l.* 19*s.* 3*d.*, &c.: whereas at the said several times of signing judgment, and of suing out the said writ of ca. sa., and of indorsing the same, and of delivery thereof to the sheriff, and of the arrest and detention of the plaintiff thereunder, a much less sum than 28*l.* 0*s.* 9*d.*, that is to say, 18*l.* 0*s.* 9*d.*, and no more, was due and owing from the plaintiff, &c.

Demurrer, and joinder therein.

Hayes, Serjt. (*Grantham* with him), in support of the demurrer.—The plaintiff is estopped by the judgment from alleging that he paid part of the debt before the judgment was signed. So long as a judgment remains unimpeached it is conclusive evidence of the amount of the debt. The plaintiff relies on *Hodges* v. *Callaghan* (*a*)

(*a*) 2 C. B. N. S. 306.

1866.
HUFFER v. ALLEN.

as an authority that where a person issues a writ specially indorsed under the 25th section of the Common Law Procedure Act, 1852, and afterwards receives payments on account of the debt, he is not entitled, in default of appearance, to sign judgment, under the 27th section, for the amount indorsed on the writ, but only for the balance after giving credit for the payments. There the amount for which the judgment was signed was reduced, by a Judge's order, to the sum actually due, which was under 20*l.*; here the judgment subsists in its original state for an amount which entitled the defendants to issue a ca. sa. upon it. [*Channell*, B.—Signing judgment, though done by the party, is the act of the Court.] In *Gilding* v. *Eyre* (*a*) the judgment was properly signed, and the ground of action was that the defendant maliciously employed the process of the Court to extort from the plaintiff money which he had paid, and which was no longer due on the judgment. Here the plaintiff should have applied to a Judge to reduce the judgment by the amount paid on account. Suppose the plaintiff had sued the defendants for goods sold, and they had pleaded this judgment by way of set-off, could the plaintiff have replied that before judgment he paid 10*l.* on account of the debt, and that the defendants wrongfully and maliciously, and without reasonable or probable cause, signed judgment for the full amount of the debt? Having allowed the judgment to remain in force, the plaintiff is precluded from bringing any action.

H. Matthews (with whom was *Griffits*), in support of the declaration.—First, the judgment is irregular; and it is admitted by the demurrer that judgment was signed maliciously, and without reasonable or probable cause. *Hodges* v. *Callaghan* (*b*) is an express authority that in signing

(*a*) 10 C. B. N. S. 592. (*b*) 2 C. B. N. S. 306.

judgment under the 27th section of the Common Law Procedure Act, 1852, it is the duty of the plaintiff to give credit for sums paid on account. [*Bramwell*, B.—That must mean *morally*. Suppose a defendant applied to a Judge to reduce a judgment on the ground that before it was signed he had made payments on account of the debt, and the plaintiff denied that any payments had been made; the only course would be to allow the defendant to plead them on payment of costs. Therefore, in strictness this is not an irregular judgment; but it is, nevertheless, a judgment which the plaintiff ought not to have signed.] The plaintiff has abused the process of the Court by signing judgment for more than was due in order to take the defendant in execution.—Secondly, the judgment is no estoppel. An estoppel only arises where judgment is signed after the defendant has pleaded, not in cases where it is signed under the provisions of the 27th section of the Common Law Procedure Act, 1852. Before that Act, a plaintiff could not obtain judgment unless he filed or delivered a declaration; and if the defendant made payments after action brought, he could plead them in bar of the further maintenance of the action, and the plaintiff could only have judgment for the balance actually due. This must be regarded as a judgment obtained by fraud. It is not necessary for the plaintiff to allege that he had obtained his discharge by order of the Court or a Judge, so as to shew that the proceedings had terminated in his favour: *Gilding* v. *Eyre* (*a*). The gravamen is that an extortion was practised upon the defendant, by arresting him for a greater sum than was due. If the judgment had been reduced it is questionable whether the declaration would have been good. Unless this action can be maintained,

(*a*) 10 C. B. N. S. 592.

1866.
HUFFER v. ALLEN.

the plaintiff is without remedy, for an action for money had and received will not lie: *De Medina* v. *Grove* (*a*).

Hayes, Serjt., was not called upon to reply.

KELLY, C. B.—I am of opinion that this action cannot be maintained, and that our judgment must be for the defendants. I say so with regret, because if the defendants, at the time of signing judgment, were aware that their claim had been reduced by payment to a sum less than 20*l.*, the act of signing judgment for the original amount of their debt, without giving credit for the payment, was altogether unjustifiable.

But we must decide the question whether this judgment, which in contemplation of law is the act of the Court, is not an estoppel, and an insuperable bar to this action. I am of opinion that it is. In ancient language, a judgment is, as between the parties, "an evidence of uncontrollable verity," and it is not competent for either of them to aver against it.

The facts are these:—The now defendants brought an action against the now plaintiff for 28*l.* The plaintiff, before appearance, paid 10*l.* on account, but took no further step. The now defendants then signed judgment, not for the sum really due, but for the original debt of 28*l.*, and took the now plaintiff in execution for that amount. He then brings this action against the now defendants for maliciously, and without reasonable or probable cause, signing the judgment for 28*l.* I am of opinion that the action is not maintainable, upon this simple principle, that whilst the judgment stands it cannot be contradicted, nor any averment made that the debt due at the time the judgment was signed was not 28*l.*, but a less sum.

(*a*) 10 Q. B. 152. 170.

It has been urged that unless the now plaintiff can proceed in this way he is without remedy. But that is not so. As soon as he ascertained that judgment was signed against him for 28*l.* (which he must have known when the execution issued), it was competent for him to apply to the Court or a Judge to reduce the amount from 28*l.* to 18*l.*, and to set aside the execution on payment of that sum. Although no averment against a judgment can be admitted so long as it stands, the Court may always correct a judgment when wrongly entered up, especially when the error may work injustice.

We need not enter into the question whether, if this judgment had been amended, the plaintiff could have maintained this action. If the plaintiff, or his attorney, with full knowledge of the payment, signed judgment and issued execution for a larger sum than was due, I see no reason why he might not maintain an action for a malicious arrest. It is not necessary, however, to decide that point. This being a subsisting judgment is an insuperable impediment to such an action, and our judgment must be for the defendants.

BRAMWELL, B.—I entirely agree with the Lord Chief Baron, except in the regret he has expressed that we are bound to give judgment for the defendants. I do not regret it; because the proper course for the now plaintiff was to have had this judgment, if irregular, made regular, when he would have got back the money he paid, together with his costs, according to the authority of *Hodges* v. *Callaghan* (*a*); but in all probability the Court would have restrained him from bringing any action. Rather than run that risk he lets the judgment stand,

(*a*) 2 C. B. N. S. 306.

1866.
HUFFER
v.
ALLEN.

and resorts to this remedy, in which he has failed; and I own I am not sorry for the result.

But, whether there is cause for regret or not, we must decide in favour of the defendants; for the plaintiff cannot impeach the judgment whilst it remains, and if the judgment is unimpeachable the execution and other proceedings are right. The plaintiff in effect says: "You have signed a judgment against me which you know to be wrong." But the judgment stands, and so long as it does it is contrary to all analogy and precedent to say that it is wrong. It is argued that the demurrer admits that 10*l.* was paid on account of the debt, and therefore it admits that the judgment is wrong. But that is not so. The defendants, by their demurrer, in effect say, "We decline to discuss that question whilst the judgment remains." It is like the case of a demurrer to a declaration for a malicious prosecution, where the declaration does not shew that the prosecution is determined.

Whether, if the now plaintiff had succeeded in rectifying the judgment, he would have been at liberty to maintain an action, is not so clear. Although the now defendants ought only to have signed judgment for the amount really due, I am disposed to think that in strictness the now plaintiff ought to have appeared and pleaded payment of the 10*l.* But upon this point I express no opinion, not having made up my mind upon it.

CHANNELL, B.—I am also of opinion that the defendants are entitled to judgment. It is urged that this money, having been paid under process of the Court, cannot be recovered back in an action for money had and received, and therefore, if this action is not maintainable, the plaintiff is without remedy. I do not say whether, if the judgment had been reduced to the proper amount, the plaintiff could

have maintained this action. He would be bound to shew, not only malice on the part of the defendants, but also that what they did was done without reasonable or probable cause. It is clear, however, that so long as this judgment remains on the Court rolls, the plaintiff cannot succeed in this action. If the judgment were amended, the amendment would have relation to the time when the judgment was originally signed. But looking at the judgment as it stands, I am clearly of opinion that this action cannot be maintained.

PIGOTT, B.—I am entirely of the same opinion. I do not intend to pronounce any opinion on the merits of the case, or to say whether, if the amendment had been made, and the defendants have issued the ca. sa. maliciously, and without reasonable or probable cause, the plaintiff would have had a good cause of action. It is sufficient to say that so long as the judgment stands it is not competent to the plaintiff to maintain this action. He should have applied to a Judge to amend the judgment. While it remains he cannot try, in an action in another Court, whether the judgment is correct. That would be most inconvenient, and would be, in fact, involving two trials in respect of the same matter. I therefore agree with the rest of the Court that our judgment must be for the defendants.

Judgment for the defendants.

1866.

Nov. 21.

Boss and Another *v.* Helsham and Others.

The defendants put up certain properties for sale by public auction, subject to the following condition:—"If any mistake be made in the description of any of the properties, or if any error shall appear in the particulars of sale, such mistake or error shall not annul the sale of the lot to which such mistake or error may relate, but in such case a reasonable compensation or equivalent shall be given or taken as the case may require either way, such compensation or equivalent to be settled by two referees, one to be appointed by either party, or an umpire to be named by the referees before they enter upon the reference, whose decision shall be final." The plaintiff was the purchaser of a house, and after the execution of the conveyance, he discovered an error in the rental as stated in the particular, and accordingly claimed compensation.

Held.—First, that the condition was not limited to errors discovered before the conveyance was executed, and that he was entitled to compensation.

Secondly, that the settlement of the amount of compensation by the referees was not an "arbitration" within the meaning of the 12th and 13th sections of the Common Law Procedure Act, 1854.

DECLARATION.—For that heretofore, to wit, on the 30th of October, 1865, the defendants put up for sale by public auction certain properties described in certain particulars of sale, and, amongst others, a property described by the defendants in the said particulars as follows, that is to say:—"Lot 3 is two freehold dwelling houses and shops, situate and being Nos. 117 and 118, Royal Mint Street, Tower Hill. No. 117 is let to Mr. Beard, at per annum 30*l.*," &c., upon and subject, amongst others, to the following conditions of sale, that is to say:—"9. The several properties are believed and shall be taken to be correctly described as to quantities and otherwise, and are sold subject to all chief and other rents, rights of way and water, and other easements, if any, charged or subsisting thereon. If any mistake be made in the description of any of the properties, or if any error shall appear in the particulars of sale, such mistake or error shall not annul the sale of the lot to which such mistake or error may relate, but in such case a reasonable compensation or equivalent shall be given or taken as the case may require, either way, such compensation or equivalent to be settled by two referees, one to be appointed by either party, or an umpire to be named by the referees before they enter upon the reference, whose decision shall be final."—That at the said auction

the plaintiffs were the purchasers of the said lot, upon and subject to the said condition, at and for the price of 690*l.*, and thereupon the plaintiffs and the defendants then agreed that the defendants should sell to the plaintiffs, and that the plaintiffs should buy of the defendants, the said lot so described, at and for the said price, upon and subject to the said condition. And the plaintiffs aver that a mistake was made in the said description of the said property, and that an error in the description of the said property appeared in the said particulars of sale, to the prejudice of the plaintiffs, in this, to wit, that the said property was described in the said particulars as of a higher annual rent and a greater annual value than the same then really was; and it was not stated in the said particulars, as the fact was, that all the rates and taxes of the said houses were, by agreement with the tenant, paid by the landlord; and thereupon the plaintiffs became entitled to be paid or allowed by the defendants a reasonable compensation or equivalent in respect of the said mistake or error, to be settled in the manner prescribed by the said condition; and thereupon the plaintiffs appointed a referee, to wit, &c., to settle such compensation or equivalent, according to the said condition, and did all things necessary on their part, &c., to entitle the plaintiffs to have the defendants appoint a referee on their part to settle the said compensation or equivalent.—First breach: that the defendants did not nor would appoint any such referee, but neglected and refused so to do.—Second breach: that the defendants failed to appoint an arbitrator or referee, under and according to the said condition, or at all, for seven clear days after the plaintiffs had appointed an arbitrator, as agreed, and had served the defendants with notice in writing to make the appointment of an arbitrator on their part; and the plaintiffs did all things to entitle the plaintiffs to

1866.
Boss
v.
HELSHAM.

appoint the said arbitrator to act as sole arbitrator in the said reference; and thereupon the plaintiffs did appoint the said arbitrator to act as sole arbitrator in the said reference; and the said arbitrator duly took upon himself the said reference, and such proceedings were thereupon had in the said reference: that the said arbitrator duly made his award in writing under the said reference, and pursuant and according to the said condition, and thereby awarded that the amount payable in respect of such reasonable equivalent and compensation for the said mistake and error to be paid by the defendants to the plaintiffs was 113*l.*, of all which the defendants had due notice. And the plaintiffs did all things necessary on their part to entitle them to be paid the said sum by the defendants, and the time for the defendants to pay the same has elapsed, yet the defendants did not pay the same, &c.

Plea, on equitable grounds (after setting out in hæc verba the particulars and conditions of sale, the latter of which provided for the payment of deposit, delivery of abstract of title and requisitions, and for completion of the purchase on the 29th of September then next):—That defendants, on &c., agreed to sell the said lot 3 to the plaintiffs on the terms stated in a memorandum indorsed on the said particulars and conditions of sale signed by the plaintiffs, whereby the plaintiffs acknowledged that they had bought the said lot for 690*l.*, and had paid the deposit, &c.: that defendants were trustees and executors, and had not, nor had either of them, at any time any beneficial estate or interest whatever in the said lot 3: that the plaintiffs, after the said sale, made certain objections and requisitions, and afterwards approved the title to the said lot 3, and afterwards, on, &c., the defendants, by their deed, to which the plaintiffs were parties, in consideration of the said sum then paid by the plaintiffs to them, con-

veyed the said hereditaments so agreed to be sold to the plaintiff in fee; and by the said indenture the defendants covenanted with the plaintiffs, &c. (setting out the usual covenant by trustees against incumbrances), and that the defendants, or either of them, did not enter into any other covenant, &c. And the plaintiffs accepted the said conveyance, and paid the said purchase money to the defendants, who received and held the same as trustees as aforesaid, and the said purchase was then finally completed. And the plaintiffs have from the time of the execution of the said conveyance hitherto been in receipt of the rents of the said hereditaments: that long after the completion of the said sale by the execution of the said conveyance and the payment of the said purchase money as aforesaid, to wit, on the 9th of February, 1866, and after the lapse of a reasonable time in that behalf from the completion of the said purchase, the plaintiffs first discovered and gave notice to the defendants of the said alleged error and mistake, and until then the defendants, or either of them, had not any notice or knowledge of any error or mistake in the said particulars, and believed the same to be correct, and the alleged appointment of the plaintiffs' referee was not made until afterwards, to wit, in April, 1866.

Demurrer, and joinder therein.

J. Brown (*Lopes* with him).—The plea is bad. The fact that the defendants are trustees cannot affect the plaintiffs' right to compensation for the error in the description of the property. The substantial defence set up by the plea is, that the plaintiffs did not give notice to the defendants of the error until the completion of the sale by the execution of the conveyance and payment of the purchase money. If the condition applied only to mistakes or errors of which notice was given before the completion of the

1866.
Boss
v.
Helsham.

sale, the plea would afford, not merely an equitable, but a good legal defence. But the condition is not so limited. It provides that a "reasonable compensation" shall be made, not that there shall be "a reduction of the purchase money," as would probably have been the case if such a limitation had been intended. Reason and authority are in favour of the plaintiffs' construction. Some mistakes could only be discovered on the purchaser taking possession of the property. In the case of *Cann* v. *Cann* (*a*) there was a similar condition, and Sir *L. Shadwell*, V. C., held that the circumstance of the purchaser having taken a conveyance did not affect his right to compensation.—He also cited *Thomas* v. *Powell* (*b*).

The first breach is founded on the authority of *Livingston* v. *Ralli* (*c*). The second breach is founded on the 12th (*d*) and 13th sections of the Common Law Procedure

(*a*) 3 Sim. 447.
(*b*) 2 Cox E. C. 394.
(*c*) 5 E. & B. 132.
(*d*) Sect. 12.—"If in any case of arbitration the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not shew that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not shew that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every such instance any party may serve the remaining parties, or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any Judge of any of the superior Courts of law or equity at Westminster, upon summons to be taken out by the

Act, 1854. This is a case of arbitration or reference within the meaning of those sections.

H. Matthews, contrà.—This action is without precedent. No instance can be found of an action based upon conditions of sale, after completion of the purchase, where there is no suggestion of fraud. The object of the conditions is to regulate the proceedings which intervene between the sale and execution of the conveyance. That such is the understanding among conveyancers appears from Dart's Vendors and Purchasers, p. 503, 3rd ed., where it is said: —"With some few special exceptions, a purchaser, after the conveyance is executed by all the necessary parties, has no remedy at law or in equity in respect of any defects either in the title to, or quantity or quality of, the estate which are not covered by the vendor's covenants." Again, at p. 487, it is said: "The vendor, after conveyance, has no remedy if the property prove to be, as respects either

party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, and third arbitrator respectively shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties."

Sect. 13.—"When the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorising the reference show that it was intended that the vacancy should not be supplied; and if on such a reference one party fail to appoint an arbitrator either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the Court or a Judge may revoke such appointment on such terms as shall seem just."

[1866.
Boss
v.
Helsham.

quantity or quality, more valuable than was imagined;" and *Okill* v. *Whittaker* (*a*) is cited, where the residue of a lease, of which twenty years were in fact unexpired, was sold under the impression that only eight years were to run, and Lord *Cottenham*, C., held that the vendors, although trustees, were bound by the conveyance. The special exceptions are considered at p. 520, and consist of fraudulent misrepresentation or concealment. In Sugden's Vendors and Purchasers, p. 245, 14th ed., it is said:—"We shall elsewhere shew that there are few cases in which a purchaser can rescind a contract after the conveyance is executed, and the purchase completed on account of the price being unreasonable." That is fully discussed at p. 272. Again, at p. 275, it is said:—"A conveyance executed will not, however, be easily set aside on account of the inadequacy of the consideration. It is not sufficient to suggest weakness and indiscretion in one of the parties; for supposing it to be an unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him unless he can shew fraud in the party contracting with him, or some undue means made use of to draw him into the agreement." At p. 551 the learned author, in treating of "relief from incumbrances," cites the case of *Cann* v. *Cann* (*b*) as an authority that the general doctrine "does not apply to a sale under the Court, where the rent is misrepresented; for although the money is paid into Court, possession delivered, and a conveyance executed, yet the Court will give the purchaser, out of the funds in Court, a compensation for the misrepresentation. The object of this condition is to prevent the purchaser from annulling the sale. The vendors, being trustees, were bound to hand over the money to their cestui que trust as soon as the conveyance was executed; and if they are liable to make compensation at any time after the completion of the sale, they

(*a*) 2 Phil. 341. (*b*) 3 Sim. 447.

themselves must pay it. Reason is in favour of the construction contended for; and it is also warranted by the words "annul the sale," which refer to such a mistake or error as would vitiate or annul the contract; *Leslie* v. *Tompson* (*a*). This is not a mistake or error which would annul the contract. [*Kelly*, C. B.—Suppose a person put up for sale a house described as let at a rental of 100*l.* a year, whereas the rental was only 90*l.*, could it be contended that the purchaser was bound to complete the contract?] The distinction is between a mere description and a warranty. If no warranty or fraud, the maxim "caveat emptor" applies. In the case of misdescription, without fraud, a Court of equity will consider whether it ought to relieve against the purchase or award compensation; but in general it will do neither after the conveyance is executed. [*Channell*, B., referred to *Gibson* v. *D'Este* (*b*).] After the conveyance is executed, and the purchase money paid, a Court of equity will not relieve against a misdescription of the value or the quantity of the land: *Anonymous* (*c*); or against incumbrances: *Serjeant Maynard's Case* (*d*).—He also cited *Bree* v. *Holbech* (*e*).

With respect to the other point it is not necessary to argue whether or not the 12th and 13th section of the Common Law Procedure Act, 1854, apply to all cases of reference, because this is not an arbitration within the meaning of that Act: Russell on Arbitration, p. 42, 3rd ed. There is a distinction between an "arbitration" in the proper sense of the term and an appraisement or valuation: *Collins* v. *Collins* (*f*), *Leeds* v. *Burrows* (*g*), *Lee* v. *Hemingway* (*h*).

(*a*) 9 Hare, 268.
(*b*) 2 Yo. & Col. C. C. 542; 1 H. L. 605.
(*c*) 2 Freem. 106.
(*d*) 2 Freem. 1.
(*e*) 2 Doug. 654 a.
(*f*) 26 Beav. 306.
(*g*) 12 East, 1.
(*h*) 3 Nev. & M. 860; 15 Q. B. 305, note.

1866.
Boss
v.
Helsham.

J. Brown replied.

Kelly, C. B.—I am of opinion that the plea is bad, and that the plaintiffs are entitled to judgment upon the first breach. It is unnecessary to enter into the subtle distinctions which have been held to prevail between representations and warranties. I concur with the doctrine so ably and perspicuously laid down by Lord St. Leonards in his valuable book on Vendors and Purchasers, where he points out the distinction between objections which entitle a purchaser to annul the contract before the purchase is completed and those which may be made afterwards. But in this case it seems to me that, with the view of avoiding those questions so full of doubt and difficulty, the parties have entered into an express contract "that if any mistake be made in the description of the properties, or if any error whatever shall appear in the particulars of sale, such mistake or error shall not annul the sale of the lot to which such mistake or error may relate, but in such case a reasonable compensation or equivalent shall be given or taken as the case may require." Now here no distinction is made (although it would obviously have been easy to make one) between a mistake or an error discovered and pointed out before or after the completion of the contract. Mr. *Matthews*, indeed, sought to impress upon us that distinction, but the contract is silent upon the subject. Then why are we to imply such a distinction? The argument on the part of the plaintiffs is unanswerable, namely, that to avoid any inquiry into the value of the property, or the amount of the rental, there is an express contract, unlimited as to time, that if any mistake or error be made it shall not annul the sale, but be made the subject of compensation.

If we were to put any other construction on this contract,

it would subject the purchaser to the inconvenience which it was the object of the condition to avoid. If he had reason to suspect any mistake in the amount of the rental, or the value of the property, or as to whether the rates and taxes were paid by the landlord or the tenant, he would be bound to make inquiry before he could complete the purchase, for, if the argument of Mr. *Matthews* is well founded, the objection, if not made before the purchase, could not be made at all. With a contract like this, the purchaser would be entirely thrown off his guard, and would disable himself from obtaining compensation for any mistake or error; for he would naturally say, "It is in vain to occupy time in raising objections as I am bound to complete the purchase by a certain day, whether the objections are well founded or not. I will abstain from making objections, because I know that they will not entitle me to annul the contract, and I will make my claim to compensation." There may be other reasons why, in order to avoid annulling the sale (which, especially in the case of trustees, might be attended with considerable inconvenience), the parties should agree that no objection should be made which would interfere with the completion of the purchase, but compensation should be given. Then, if we look at the terms of the contract, they include mistakes and errors which the purchaser had no opportunity of discovering or means of ascertaining before the completion of the purchase. I think that the plaintiffs are entitled to compensation, and that this is one of the special exceptions to which Lord St. Leonards alludes.

As to the second objection, it is much to be regretted that any refined distinction should be made between one case and another with respect to the arbitration clauses in the Common Law Procedure Act, 1854. I think that in general it is highly beneficial, whenever there is any proceeding in the nature of an arbitration, that these clauses

1866.
Boss
v.
Helsham.

should apply. But we are bound by authority; and I confess I am unable to distinguish in substance and principle the case of *Collins* v. *Collins* (*a*) from this case. The principle enunciated in *Collins* v. *Collins* is, that in order to constitute an arbitration there must be a difference; and where the contract or state of things on which the question arises shews that there is no difference, that authority compels us to hold that there is no arbitration, and consequently the case is not within the Common Law Procedure Act, 1854. There Sir *J. Romilly*, M.R., said: "An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties" . . . . "Undoubtedly, if two persons enter into an arrangement for the sale of any particular property, and try to settle the terms but cannot agree, and after dispute and discussion respecting the price, they say, 'we will refer this question of price to A. B., he shall settle it,' and thereupon they agree that the matter shall be referred to his arbitration, that would appear to be an 'arbitration' in the proper sense of the term, and within the meaning of the Act; but if they agree to a price to be fixed by another, that does not appear to me to be an arbitration." In this case there is nothing whatever to point to a difference between the parties. The language of the condition is simply, any mistake in the description of the property, or any error in the particulars of sale shall be the subject of compensation or equivalent to be settled by two referees. There is nothing either to shew or to lead to anticipation of any difference between the parties, so as to give the proceeding the character of an arbitration as defined by the Master of the Rolls in *Collins* v. *Collins*. If we attempted to distinguish

(*a*) 26 Beav. 306. 312.

this case from *Collins* v. *Collins*, we should be introducing subtle distinctions which it is important to avoid.

Under these circumstances, I am of opinion that the plaintiffs are entitled to judgment on the first breach, and the defendants on the second breach.

Channell, B.—This case comes before the Court on demurrer to a plea, and as that plea is pleaded to two distinct breaches in the declaration, it becomes necessary to consider each by itself, because it may well be that the plea affords an answer to the one and not to the other.

In the course of the argument some points were introduced upon which it is unnecessary to give any opinion; for instance, what would have been the right of the parties, if there had been no such condition as that in question; whether the purchasers could have rescinded the contract or maintain an action for compensation; because here is an express provision that such a mistake or error as is represented on this record shall not annul the sale. Nor do I think it necessary to enter into an examination of the authorities which are supposed to decide that where the conveyance has been executed and possession taken the rights of the parties are determined, except in the case of fraud. I consider it unnecessary to enter into that question, because the parties cannot rescind the contract—the contract stands, the conveyance has been executed, and possession taken.

But we are to determine whether, under the circumstances which appear upon the record, as regards the first breach, the plaintiffs are entitled to sue for compensation. I am of opinion that they are. It is said that they cannot, because the conveyance has been executed. I am not of that opinion. We are dealing with an express contract between the parties; for we must, upon this record, consider the condition as an agreement between the plaintiffs

1866.
Boss
v.
Helsham.

and the defendants. Assuming that to be the correct view, the right to compensation springs out of an express agreement between the parties. Then why are we to put a limitation on the contract, which the parties themselves have not put? Why are we to say that because the mistake was not discovered until after the conveyance was executed, the purchasers cannot sue for compensation? If we did so, we should be making a new contract for the parties by importing into their contract a limitation which never existed. Therefore I think that the plaintiffs are entitled to judgment on the first breach.

Then with respect to the second breach, the point to which I have adverted equally arises on that breach. But the plaintiffs thereby seek to recover a specific sum alleged to have been settled and ascertained by an arbitrator appointed by the plaintiffs to act as sole arbitrator by reason of the default of the defendants in appointing an arbitrator. The sum has been settled according to the literal construction of the ninth condition, and if that condition could be read in connection with the provisions of the Common Law Procedure Act, 1854, the sum would have been ascertained with sufficient accuracy to enable the plaintiffs to recover it. But I do not think that, even without the case of *Collins* v. *Collins*, I should have been of opinion that this condition was an agreement to refer to arbitration within the meaning of the 12th and 13th sections of the Common Law Procedure Act, 1854, but having regard to that case I am clearly of opinion that it is not, and that the amount has not been ascertained so as to entitle the plaintiffs to recover on the second breach. I agree with the Lord Chief Baron, that the plaintiffs are entitled to judgment on the first breach, and the defendants on the second.

Pigott, B.—I agree with the Lord Chief Baron and my brother *Channell* on both points. They have stated their

reasons at length, and it is not necessary for me to add much upon either branch of the case.

With reference to the first breach, I am of opinion that the plaintiffs are entitled to recover. I found my judgment upon the construction put upon the 9th condition. I think it is not subject to the limitation which is sought to be put upon it, and that the plaintiffs are entitled to compensation, although the conveyance has been executed and the purchase money paid. Neither do I think that any of the passages cited from Lord St. Leonards' book on Vendors and Purchasers conflict with our judgment. I agree with the Lord Chief Baron that this is one of those excepted cases to be dealt with on the language of the special contract.

With respect to the second breach, I also think that this is not an "arbitration" within the meaning of the Common Law Procedure Act, 1854, because there is no matter of difference between the parties. That becomes perfectly clear when we see what is referred. If there is any error in the particulars there is to be a reference as to the amount of compensation. If the parties had differed as to whether there was an error or not, the case might have been different; but the parties agree that there is an error, and the amount of compensation alone is to be ascertained by the referees. I am sorry that nice distinctions are imported into cases of this kind, as it often creates difficulty.

Judgment for the plaintiffs on the first breach, for the defendants on the second.

1866.

Nov. 19.

THE AGRA AND MASTERMAN'S BANK (LIMITED) *v.* LEIGHTON.

To an action by indorsees against acceptor of a bill of exchange for 3000*l.* the defendant pleaded—Thirdly: that whilst the plaintiffs were holders B. paid them the full amount of the bill, and then became entitled to become the holder; yet the plaintiffs did not deliver up the bill to him, but were suing without the authority of B. or any other person. Fourthly, on equitable grounds: that the bill was accepted for the price of certain goods, and on the faith of their being shipped for the defendant by the drawer: that the drawer shipped certain of the goods a portion only of which the defendant received and accepted, amounting in price to 1200*l.*: that by reason of the non-completion of the shipment the goods actually shipped became useless, and except as aforesaid there never was any value or consideration for the acceptance or payment of the bill: that the drawer paid the full amount of the bill to the plaintiffs; and that the drawer was indebted to the defendant in the sum of 1200*l.*, which he was willing to set off against the plaintiffs' claim.

Held.—First: that the third plea was bad, inasmuch as it was consistent with the facts stated in it that the plaintiffs were the lawful holders of the bill and entitled to sue upon it.

Secondly: that the fourth plea was good, since it shewed a failure of consideration except as to 1200*l.*; and as the plaintiffs had been paid the full amount of the bill by the drawer, and sued as trustees for him, the defendant was entitled to set off the debt due to him from their cestui que trust.

DECLARATION on two bills of exchange, dated the 19th of December 1865, drawn by the Blakeley Ordnance Company upon and accepted by the defendant for payment respectively of 3000*l.* three and four months after date, and endorsed by the drawers to the plaintiffs.

Third plea.—That whilst the said bills were in the hands of the plaintiffs as the holders thereof, one T. Blakeley paid to the plaintiffs the full amount due to the plaintiffs in respect of the said bills, and the said T. Blakeley then became entitled to become the holder of the said bills. Yet the plaintiffs did not deliver the said bills to the said T. Blakeley, but are now suing on the said bills without the authority of the said T. Blakeley, or of any other person entitled to maintain an action upon the said bills or either of them.

Fourth plea, on equitable grounds.—That the said bills were, and each of them was, accepted for the price of certain goods, to be sold to and shipped for and on account of the defendants to Japan, and on the faith of the shipment of such goods having then been completed by the said

Blakeley Ordnance Company; and that after the acceptance of the said bills, and before the same or either of them became due, the said Blakeley Ordnance Company refused to complete the said shipment and only shipped certain of the said goods, and that the defendant only received and accepted a certain portion of the said last mentioned goods, amounting in price and value to 1200*l.* And by reason of the non-completion of the said shipment, the goods actually shipped became useless to the defendant, and the defendant, as he lawfully might, gave notice to the said Blakeley Ordnance Company that he would not accept or receive the residue of the said goods so shipped by them as last aforesaid; and except as aforesaid there never was any value or consideration for the acceptance or payment of the said bills or either of them by the defendant, and that whilst the said bills were in the hands of the plaintiffs as the holders thereof, one T. Blakeley, as agent of the said Blakeley Ordnance Company, paid to the plaintiffs the full amount due to the plaintiffs in respect of the said bills, and the said Blakeley Ordnance Company then became entitled to be the holders of the said bills, and the plaintiffs have since held the said bills without any value or consideration whatever. And that as to the said sum of 1200*l.*, being the price and value of the goods so accepted and received by him from the Blakeley Ordnance Company as aforesaid, the defendant says that the said Blakeley Ordnance Company are and were at the commencement of this action indebted to him, the defendant, in an equal amount for goods sold and delivered, and for goods bargained and sold by the defendant to the said Blakeley Ordnance Company, and for monies paid, laid out, and expended by the defendant for the Blakeley Ordnance Company at their request, which amount the defendant is and always has been willing to set off against

1866.

AGRA AND MASTERMAN'S BANK v. LEIGHTON.

the Blakeley Ordnance Company's claim in respect of the price of the said goods so accepted and received by the defendant from the said Blakeley Ordnance Company as aforesaid.

Demurrer to each plea, and joinder therein.

Cohen, in support of the demurrer.—The third plea is bad on several grounds. It does not state that the payment was made at the request, or in discharge of the liability of the defendant. Nor does it shew any privity between T. Blakeley and the defendant. Neither does it appear that the payment was made upon any contract or condition, either that the bills should be delivered up, or deemed to be satisfied as between the plaintiffs and the acceptor. Nor does the plea state that the plaintiffs are suing, in contravention of an agreement with T. Blakeley; but only that they are suing "without his authority." It is consistent with every allegation in the plea that the plaintiffs are suing as trustees for T. Blakeley or the drawers. Satisfaction of a bill as between a drawer or indorser and an indorsee, does not necessarily enure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the indorsee: *Jones* v. *Broadhurst* (*a*). It is doubtful whether satisfaction of a bill by a stranger is a good plea. All the authorities on that subject are referred to in the judgment of the Court in *Jones* v. *Broadhurst*, but the point was not decided, not being necessary to the determination of the case.

The fourth plea is also bad. It merely discloses a partial failure of consideration, which might entitle the defendant to maintain an action against the Blakeley Ordnance Company; but as the damages would be unliquidated, they cannot be assessed by way of set-off in an action on the bill: Byles on Bills, p. 119, 120, 8th ed. Nor is the plea

(*a*) 9 C. B. 173.

good as an equitable defence; for where the damages arising from the breach of a contract for which a bill is given are unliquidated, so as not to be the subject of set-off at law, a Court of equity will not grant an injunction to restrain an action on the bill: *Glennie* v. *Imri* (*a*). Moreover, that part of the plea which alleges a set-off against the price of the goods accepted by the defendant is also bad. It proceeds on the assumption that the plaintiffs, having been paid by the Blakeley Ordnance Company, are suing as trustees for them. But if that be so there would not be a good set-off at law, because it is not between the parties to the action; and where a trust intervenes an equitable set-off can only be pleaded where it would constitute a good set-off at law: *Cochrane* v. *Green* (*b*).

Sir *G. Honyman* (*McIntyre* with him), in support of the pleas.—The third plea is good. It avers that T. Blakeley was entitled to become the holder of the bills, and that the plaintiffs are suing on them without his authority. That would be untrue if the bills were left in the hands of the plaintiffs in order that they might sue upon them.

The fourth plea is also good. It shews a total failure of consideration, for it is stated that by reason of the non-completion of the shipment the goods actually shipped became useless to the defendant. If the Blakeley Ordnance Company had sued the defendant for the price of the goods, he would have had a complete defence on the ground that the consideration wholly failed. This is like the case of a bill given on a contract to deliver two chattels, and one only being delivered the other becomes useless to the purchaser. But, assuming that there is only a partial failure of consideration, the money as to which the consideration fails is not matter of unliquidated damages, but of

(*a*) 3 Y. & C. E. C. 436. (*b*) 9 C. B. N. S. 448.

1866.

AGRA AND MASTERMAN'S BANK v. LEIGHTON.

definite computation. It is only necessary to deduct the price of the goods accepted by the defendant from the total amount of the contract. There is therefore a good set-off pro tanto within the rule laid down in Byles on Bills, p. 119, 8th ed., and Bayley on Bills, p. 505, 6th ed. In *Glennie* v. *Imri* (*a*) the plaintiff complained that the goods delivered to him were inferior in quality, and that would only be the subject of unliquidated damages.

Cohen, in reply, referred to *Belshaw* v. *Bush* (*b*) and *Moggridge* v. *Jones* (*c*).

BRAMWELL, B.—I am of opinion that the third plea is bad. The pleader might have made it good if he had thought fit; but he has not done so. The defence attempted to be set up is that the plaintiffs were not the lawful holders of the bills at the time the action was brought. But that is not so stated. The statement is, that T. Blakeley paid the plaintiffs the full amount due to them in respect of the bills. No necessary consequence follows from that. He may have paid them for a variety of reasons. The plea goes on to state that T. Blakeley then became entitled to become the holder of the bills, yet the plaintiffs did not deliver them to him. It is perfectly consistent with that statement that the defendant did not insist upon having the bills, but left them in the hands of the plaintiffs. They would then have de facto possession of the bills and be entitled to avail themselves of any remedies which the other parties to the bills might have against the defendant. If the plea had said in so many words that the plaintiffs were not the lawful holders of the bills, and that T. Blakeley demanded them of the plaintiffs, who refused, and still refuse, to deliver them up, the plea might have been

(*a*) 3 Y. & C. E. C. 436. (*b*) 11 C. B. 191.
(*c*) 14 East, 486.

good. But that has not been done, and I hold the plea to be bad.

As to the fourth plea, so far as I understand it, I think it good. Probably, it is immaterial how we decide this question, because the ultimate decision will depend upon the facts. As I understand the plea, it means this: "I accepted these bills for the price of certain goods sold to me, and to be shipped; that a portion only of those goods were shipped, and of that portion I only accepted goods of the value of 1200*l.*; that in consequence of the entire quantity not having been shipped, those which were shipped became useless to me, and I would not accept them: therefore I ought only to pay 1200*l.*, and I have a set-off to that amount against the Blakeley Ordnance Company, who have paid you the full amount of the bills."

Assuming that to be the meaning of the plea, I think it affords a good defence if it shews that the plaintiffs were not the holders of the bills for value beyond 1200*l.*, as to which there is a set-off. Then, does it shew a defence to the whole except 1200*l.*? I think it does. Suppose a bill is given upon a contract to deliver 3000*l.* worth of goods, namely 1200*l.* worth of stockings and 1800*l.* worth of gloves. All the stockings are sent, and the purchaser accepts them; but the right hand gloves alone are sent, and the purchaser rejects them. The consideration for the bill might have wholly failed, for the purchaser need not have accepted the stockings without the gloves; having done so, he is bound to pay for them; but he had a right to reject the useless gloves, and to make a deduction in respect of the whole price of the gloves, viz. 1800*l.* That seems to me the meaning of the plea, and if it is I think that the amount to be deducted is sufficiently definite to take the case out of the rule that a partial failure of consi-

1866.
AGRA AND MASTERMAN'S BANK v. LEIGHTON.

deration will constitute no defence to an action on a bill, if the quantum to be deducted be matter, not of definite computation, but of unliquidated damages. There must be judgment for the plaintiffs on the demurrer to the third plea, and for the defendant on the demurrer to the fourth.

CHANNELL, B.—I am also of opinion that the plaintiffs are entitled to judgment on the demurrer to the third plea. At first I doubted whether it might not be held good, on the ground that the plaintiffs, at the commencement of the action, were not the holders of the bills; for such a plea does not mean that the plaintiffs were not holders in the sense of having possession, but holders with a right to sue. But on consideration I think the plea fails on the ground pointed out by my brother *Bramwell*, because it does not allege that the plaintiffs were tortious holders. It is quite consistent with every allegation in it that the plaintiffs are entitled to sue upon the bills. The plea does not say that the plaintiffs sue against the will, but only without the authority of T. Blakeley. That may mean that they have not clothed themselves with complete authority.

With respect to the fourth plea, I am of opinion that the defendant is entitled to judgment. The substance of that plea is this: "I accepted these bills upon the faith of your shipping certain goods under a contract. You have shipped only part of the goods, some which I have accepted and am therefore bound in justice to pay for: I now seek to make this a defence to all your claim on the bills, except that in respect of the goods which I have accepted." I do not intend to throw the least doubt on the decisions that where a defendant sets up a partial failure of consideration as an answer pro tanto to an action on a bill of

exchange, the money to be deducted must be of a specific ascertained amount, and not merely unliquidated damages. Here the sum in respect of which the deduction is claimed is not unliquidated damages, but capable of definite computation. If the plea had stated the amount of the whole contract, all difficulty would have been avoided. But, although the language of the plea is not so specific as it ought to have been, the sum sought to be deducted may be sufficiently ascertained to take the case out of the operation of the rule.

As to the set-off, I think this case is fairly within the inference to be drawn from the case of *Cochrane* v. *Green* (*a*). This is, indeed, the converse of that case. There it was decided that, where A. has a money demand against B., and B. (although a trustee) has a money demand against A. which, but for the intervention of the trust, would have constituted a good legal set-off against A.'s demand, it may be pleaded by way of equitable set-off. I think it a fair deduction from that case that the defendant is entitled to set up against the claim of the plaintiffs as trustees the debt due from their cestui que trust.

PIGOTT, B.—I am also of opinion that the third plea is bad. It is consistent with all the facts stated in it that the plaintiffs are rightfully in possession of the bills, and lawfully entitled to sue upon them.

As to the fourth plea, I think it good. The rule laid down in Bayley on Bills (*b*) as to partial failure of consideration is, that "it will constitute no defence if the quantum to be deducted be matter, not of definite computation, but of unliquidated damages." Here the deduction is a matter of definite computation, for the plea states

(*a*) 9 C. B. N. S. 448. (*b*) Page 505, 6th ed.

1866.

AGRA AND MASTERMAN'S BANK v. LEIGHTON.

that 1200*l.* is alone due in respect of the goods accepted. On that ground, and agreeing with my brothers *Bramwell* and *Channell* as to the equitable right of set-off, I think that the defendant is entitled to judgment on that plea.

Judgment for the plaintiffs on demurrer to the third plea, and for the defendants on demurrer to the fourth plea.

Nov. 21.

CHRISTIE, APPELLANT, *v.* THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

By indenture, reciting a dissolution of partnership between two partners; that an account had been taken of the partnership assets, and that the amount due to the retiring partner was 110,000*l.*, and that it had been arranged that the remaining partner should pay him 10,000*l.* in cash, and that the remainder should be secured by mortgage of the assets of the firm, and a policy of assurance, the retiring partner conveyed to the continuing partner all his estate and interest in the partnership property, real and personal, and the goodwill of the business.—*Held*, that the deed was a conveyance upon the *sale* of property within the meaning of the 13 & 14 Vict. c. 97, Sched. tit. Conveyance, and was chargeable with an ad valorem duty upon the 110,000*l.*

THIS was a case stated by the Commissioners of Inland Revenue, pursuant to the 13 & 14 Vict. c. 97, s. 15, to enable Charles Christie to appeal to this Court against the determination of the Commissioners as to the stamp duty chargeable on the indenture hereinafter mentioned.

This indenture was dated the 21st of March, 1866, and was made between John Back, of the first part, Robert Hunt, of the second part, Philip Longmore and Matthew Longmore, of the third part, and Charles Christie, of the fourth part.

It recited that John Back and Charles Christie had carried on the business of brewers, under the style of Christie & Co., from the 29th of September, 1858, up to the 29th of September, 1865, and that the copartnership had been dissolved as from the latter date.

It then recited an indenture, dated the 20th of March, 1866, by which (after reciting that the amount of the partnership assets had been stated and a balance sheet signed shewing the copartnership debts, credits and profits and the respective shares of the partners, and their loans to the copartnership, and that the amount due to John Back, the retiring partner, had been found to be 110,000*l.*, and that it had been arranged that Charles Christie should pay to him 10,000*l.* in cash, and that the remaining 100,000*l.* should be secured by mortgage of the assets of the firm and an assignment of certain policies of assurance on the life of Charles Christie, but without making any payment for the share of John Back in the goodwill of the business; and that Charles Christie had accordingly paid the said sum of 10,000*l.*, and the terms of the proposed mortgage had been arranged, and the said mortgage was to be executed as soon as the said John Back and certain other persons, trustees of a portion of the property to be comprised in it, should have effectually conveyed and assured the freehold and leasehold part thereof to the said Charles Christie,) it was declared that the copartnership had been dissolved from the 29th of September 1865, and that the said John Back would forthwith, by all necessary acts and deeds, release to the said Charles Christie his estate in the copartnership property, and that both of them would use their best efforts to procure the consent of all trustees in whom any of the partnership property might be vested, and that the said Charles Christie would execute the said mortgage and would pay all partnership debts, and that in the meantime the said John Back would stand possessed of all such parts of the assets of the late copartnership as might be legally vested in him in trust for the said Charles Christie.

It then recited that the assets of the copartnership con-

1866.

CHRISTIE v. COMMISSIONERS OF INLAND REVENUE.

sisted of freehold, copyhold and leasehold premises, set forth respectively in the first, second and third schedules annexed: that certain portions thereof were legally vested in the said Robert Hunt, formerly a partner in the said business, and in Philip Longmore and Matthew Longmore, executors of Peter Christie, formerly a partner in the same firm, but that they had no beneficial interest in the same, and had agreed to execute the said deed.

The parties of the first, second and third parts, in pursuance of the agreement and in consideration of the premises, granted and released unto and to the use of the said Charles Christie, his heirs and assigns, for ever, all the freehold, copyhold and leasehold premises, and also the goodwill and plant of the business; and they covenanted that they had not encumbered, and for further assurance. Charles Christie covenanted to pay the rents and perform the covenants in the leases.

The indenture was executed by all parties and attested.

The said Charles Christie presented this indenture to the Commissioners of Inland Revenue, under the 13 & 14 Vict. c. 97, s. 14, for them to assess the stamp duty to which it was liable, submitting that the deed was not a conveyance upon the sale of property within the meaning of the schedule to the Act, and was only chargeable with a duty of 1*l.* 15*s.* (besides progressive duty) as on a deed not otherwise charged by any Act or Acts.

The Commissioners claimed 550*l.* 10*s.*, being the ad valorem conveyance duty, at the rate of 5*s.* for every 50*l.*, in respect of the sum of 110,000*l.*, the purchase or consideration money expressed in the deed, under the 13 & 14 Vict. c. 97, and the 28 & 29 Vict. c. 96, s. 1, and forty-one progressive duties of 10*s.* each, the deed containing forty-one entire quantities of 1080 words over and above the first quantity of 1080 words.

No question was raised as to the progressive duty.

The indenture was, on payment of the said sum, duly stamped by the Commissioners; but the said Charles Christie having declared himself dissatisfied with the determination of the Commissioners, and having complied with the requisitions of the 13 & 14 Vict. c. 97, s. 15, required the Commissioners to state specially and sign a case for the opinion of the Court on the question whether the said indenture of the 21st March, 1866, was chargeable with ad valorem conveyance duty in respect of the sum of 110,000*l.* therein mentioned, or on any and what sum.

Joshua Williams (with whom was *Jolliffe*), for the appellant.—This deed is not a conveyance within the meaning of the 13 & 14 Vict. c. 97, Sched. tit. Conveyance, which imposes an ad valorem duty on a "conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, *upon the sale* of any lands, tenements, rents, annuities *or other property*, real or personal," &c. There is no sale or purchase of property. The two partners agree to dissolve partnership, and to ascertain the rights of each in respect of the partnership property. Neither is entitled to the real estate quâ real estate, but only as money. In *Darby* v. *Darby* (*a*) *Kindersley*, V. C., said that "the mere contract of partnership, without any express stipulation, involves in it an implied contract, quite as stringent as if it were expressed, that at the dissolution of the partnership all the property then belonging to the partnership, whether it be ordinary stock in trade, or a leasehold interest, or a fee simple estate in land, shall be sold, and the net proceeds, after satisfying all the partnership debts and liabilities, be divided amongst the partners." In Lindley on Partnership, p. 713, it is laid down (*b*) that

(*a*) 3 Drew, 495. 505.

(*b*) This doctrine is corrected in the 2nd edition, p. 850.

1866.

CHRISTIE v. COMMISSIONERS OF INLAND REVENUE.

"an assignment by a partner of his shares and interest in the firm to his copartners is, in fact, only a release by him on payment of what is due to him from the firm. Such a transaction ought not to be considered as a *sale* of property within the meaning of the Stamp Acts, so as to render it necessary to stamp the deed with an ad valorem stamp. In point of fact there is nothing sold; for in substance the retiring partner merely takes what is his (or what is agreed on as his), gives a receipt for it, and acknowledges that he has no more claims on his copartners." *Belcher* v. *Sikes* (*a*) is cited in support of that doctrine. The word *sale* in the schedule of the Act should be strictly construed. If the legislature had intended to impose so heavy a duty on partners who dissolve partnership, they would have inserted a distinct heading "Dissolution of Partnership." The enactment was only intended to apply to what is popularly and ordinarily called a "sale." Where a father seized in fee of an estate conveyed it to his son by a deed which recited that the father was minded and had resolved to give and assure it to his son, as well in consideration of natural love and affection as also in consideration of the provision which the son had that day made (by his bond) of 1500*l.* in augmentation of the portions of his sisters: it was held that this was not a *sale* to the son within the meaning of the 48 Geo. 3, c. 149, and that the conveyance was not subject to ad valorem duty: *Denn* d. *Manifold* v. *Diamond* (*b*). *Bayley*, J., there said, "I cannot agree to the position that wherever money is paid there is a sale." The principle contended for was laid down by Lord *Tenterden*, C. J., in *Blandy* v. *Herbert* (*c*), where the question was whether the transaction described in the deed was a "sale" of an annuity in the ordinary sense and acceptation

(*a*) 6 B. & C. 234. (*b*) 4 B. & C. 243.
(*c*) 9 B. & C. 396.

of the term. The same principle was affirmed in *Massy* v. *Nanney* (*a*). In order to ascertain the amount of duty payable, regard must be had to the consideration or purchase money: *The Marquis of Chandos* v. *The Commissioners of Inland Revenue* (*b*). Here the conveyance is made "in pursuance of the agreement and in consideration of the premises," not in consideration of the payment of a sum of money. An exchange upon which money has been paid for equality of partition is not a "sale" within the Stamp Acts: *Henniker* v. *Henniker* (*c*). In *Potter* v. *The Commissioners of Inland Revenue* (*d*) there was an express bargain and sale of the goodwill of a trade; and the only question was whether "goodwill" was "property" within the meaning of the 13 & 14 Vict. c. 97, Sched. "Conveyance?" In *The Ulverstone and Lancashire Railway Company* v. *The Commissioners of Inland Revenue* (*e*) a railway Company, under the powers of an act of parliament, sold their railway and works to another railway Company.

The Attorney General (with whom were *The Solicitor General*, Sir *W. Bovill* and *Crompton Hutton*) appeared for the Commissioners of Inland Revenue, but were not called upon to argue.

KELLY, C. B.—The case has been ably argued, but in my opinion it does not admit of any reasonable doubt. In determining the amount of stamp duty to which a deed is liable, the substance of the transaction to be collected from the instrument itself is alone to be considered. Here the substance of the transaction seems to me, beyond all question, a sale by Back to Christie of Back's interest in the

(*a*) 3 Bing. N. C. 478.
(*b*) 6 Exch. 464.
(*c*) 1 E. & B. 54.
(*d*) 10 Exch. 147.
(*e*) 2 H. & C. 855.

1866.

CHRISTIE v. COMMISSIONERS OF ISLAND REVENUE.

partnership property for the sum of 110,000*l.* I can see no distinction, with respect to stamp duty, between a sale by Back to Christie, the remaining partner, and a sale by Back to any other person who might be disposed to enter into partnership with Christie. The more we look at the deed, the more clearly does that appear to be the real substance of the transaction. On the contemplated retirement of Back a balance sheet was made out, which enumerated all the partnership property, and reference is made in the balance sheet to loans by one or the other or both partners to the partnership firm. It does not appear what was done with these loans, nor whether the money was to remain in the firm or be paid off, nor whether it was taken into consideration in estimating the interest of Back in the partnership property. We cannot treat it, under the terms of this deed, as an element in the consideration of the question. The result is, that this is simply a sale by Back to Christie of Back's interest in this valuable partnership property for the consideration of 110,000*l.*

Certain cases have been referred to by Mr. *Williams* as either establishing a different principle or tending to a different conclusion. He referred to the well known case where partnership property, though it may consist wholly or in part of real estate, is upon a dissolution treated, as between the partners, not as land but as money. That is, in fact, the same as the case where a man devises real estate to be sold and converted into money, and a Court of equity considers that done which was directed to be done, and deals with the estate as if it had been turned into money. But if that property is sold, who can doubt that the conveyance would be liable to an ad valorem stamp duty with reference to the amount of the purchase or consideration money?

Then, again, cases of family settlements have been

referred to, and those, no doubt, have been determined on a different principle, and have been held exempt from stamp duty. But those are cases, as indeed generally occurs in family settlements, in which, although the estate is conveyed by one person to another, the person to whom it is conveyed confers some benefit either on the grantor or some member of the family. Looking, as we ought, to the substance of the transaction, such a case does not resemble a sale; it is in fact a mere arrangement between different members of the same family. For instance, a father, in conveying to his son a landed estate worth 20,000*l.* a year, may require the son to settle a certain sum upon a daughter or younger children; but that sum cannot be considered as the price or purchase money of the estate conveyed by the father to the son. All those cases, therefore, are distinguishable not only in principle but also in fact.

There remains a third class of cases, viz., that of partition; and it is only necessary to consider what a partition is, to see that it is totally unlike a sale and purchase of real estate. Persons interested in real estate as joint tenants or tenants in common are frequently content to take less than the value of their interest in order that they may obtain an estate in severalty; and when such an arrangement takes place, whether the parties agree to divide the property into equal portions, or that one shall pay a sum of money to the other, or to all the others, the sum so paid is not the price or purchase money of the property acquired under the partition. Looking at the substance of the transaction, the real consideration is the liberty and power of holding the property in severalty; and it is not a sale and purchase for a pecuniary consideration, which in general would bear some proportion to the real or supposed value of the property.

1866.

CHRISTIE v. COMMISSIONERS OF INLAND REVENUE.

Looking at this conveyance, it appears to me an ordinary conveyance on the sale and purchase of a large and valuable property, which, previously to the conveyance, was partnership property. It is true that the conveyance is made by one partner to another, but it is, in contemplation of law as well as in fact, a sale of the property in consideration of the price or purchase money of 110,000*l.*

CHANNELL, B.—I am also of opinion that the determination of the Commissioners was right. It was conceded very early in the argument that if this had been the ordinary case of a conveyance by one person to another this stamp duty would have been payable. Of that there can be no doubt. This is a conveyance by one partner to another, and the only question is whether it is a conveyance within the meaning of the schedule to the Act, or, in other words, a conveyance *upon the sale* of property.

I admit that we must not endeavour to fix the subject with liability to duty by any strained construction of the Act. On the other hand, I agree with the Lord Chief Baron that we must look at the substance of the transaction; and it appears to me that the bargain between the parties, which has been carried into effect by this conveyance, is a bargain that the one partner should sell to the other his interest in the firm and the partnership property for the sum of 110,000*l.* A part of that was to be secured by mortgage. The amount of the purchase money was ascertained by a stock account being taken; but I am unable to see that that fact makes any distinction. If one partner, without any account being taken, had said to the other, "I will sell you all my interest for a sum named," and there had been a conveyance carrying out that arrangement, it is conceded that duty would have been payable as upon a sale. Here an account has been

taken in order to ascertain what was a fair sum for the one party to receive and the other to give on the retiring partner relinquishing his interest in the business, so that the entire property might vest in the other.

PIGOTT, B.—I am of the same opinion. I agree that we must look at the substance of the transaction. Then what is the substance of the transaction? All that was done is perfectly fair and fully expressed in the plainest language. Mr. Back wishes to retire from the partnership, and Mr. Christie wishes to carry on the business. Mr. Back's interest is ascertained to be worth 110,000*l.*; and in consideration that Mr. Christie will pay him 10,000*l.*, and give him the security of a mortgage, and the further security of a policy of assurance on the life of Mr. Christie for 100,000*l.*, Mr. Back conveys to Mr. Christie his entire interest in the property. Such is the substance of the transaction, and is not that a conveyance upon a *sale* of property? If it had taken place between a third person, not a member of the firm, and Mr. Back, there could have been no doubt that the ad valorem duty now imposed on the conveyance would have been payable; and it seems to me to make no difference that the transaction took place between Mr. Back and a member of the firm.

Determination of Commissioners affirmed.

1866.

Nov. 14.

Lewis and Another *v.* McKee.

To a declaration on a bill of lading for freight of goods "to be delivered as ordered" unto the defendant or his assigns, the defendant pleaded that before the arrival of the goods he endorsed the bill of lading: "Deliver to Messrs. W. & K. or order, looking to them for all freight, without recourse to us." The plea then stated that plaintiffs accepted the indorsement, and delivered the goods in pursuance thereof to Messrs. W. & K. as the persons entitled to the goods, and not to the defendant.—*Held*, on demurrer, that the facts stated in the plea shewed that the plaintiffs had accepted the substituted liability of Messrs. W. & K., and consequently could not enforce their claim for freight against the defendant.

DECLARATION.—That after the 14th of August, 1855, one J. Brown delivered to the plaintiffs certain goods, to wit, &c., to be by the plaintiffs carried and conveyed in a certain ship of the plaintiffs, then in the port of Laraiche, in the principality of Tunis, from Laraiche to Cork or Falmouth, in the United Kingdom, for orders, under a certain bill of lading signed for the same by the master of the said ship as agent for the plaintiffs, and *to be delivered as ordered* (the act of God, the Queen's enemies, fire, all and every other dangers and accidents of the seas, &c. excepted), unto the defendant, or to his assigns, on his or their paying freight for the said goods as per charter-party, with primage and average accustomed; and that thereupon, and by reason thereof, the property in the said goods passed to the defendant; and that by the charter-party referred to in the said bill of lading freight is made payable in cash at certain rates therein specified.—Averment of performance of all conditions, &c., necessary to entitle the plaintiffs to have the freight, primage, and average paid by the defendant according to the terms of the said bill of lading and charter-party, and to sue defendant for nonpayment thereof.—Breach nonpayment.

Plea.—That by the said charter-party it was provided that the plaintiffs should deliver the said goods on being paid freight by the receiver of the cargo. And that before the said ship arrived at the port of call, and before the

time had arrived for the delivery of the said cargo, the defendant indorsed the said bill of lading to certain persons carrying on their business under the firm and style of Messrs. Watney & Keene; and the said indorsement was in the words following, that is to say:—"Deliver to Messrs. Watney & Keene, or order, looking to them for all freight, dead freight and demurrage, without recourse to us. (Signed) George B. McKee & Co." And the defendant further says that the plaintiffs accepted the said indorsement, and delivered the goods in pursuance thereof to the said Messrs. Watney & Keene, as the persons entitled to the said goods, and not to the defendant.

Demurrer, and joinder thereon.

J. B. Karslake (*C. P. Brett* with him), in support of the demurrer.—The plea is framed upon the Bills of Lading Act, (18 & 19 Vict. c. 111), which was passed in consequence of the decision in *Thompson* v. *Dominy* (*a*). By the first section of that Act, "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all right of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." The declaration states, and it is admitted by the plea, that the property in the goods passed to the defendant; he is therefore liable for the freight unless the property passed from him to some other person. But the plea does not state that the property vested in the indorsees of the bill of lading or that the defendant ceased to have any property in the goods. In *Smurthwaite* v. *Wilkins* (*b*) the plea

(*a*) 14 M. & W. 403. (*b*) 11 C. B. N. S. 842.

1866.
LEWIS v. McKEE.

contained averments to that effect. This plea does not set up a rescission of the contract before breach, or satisfaction and discharge after breach, but merely alleges that the plaintiffs accepted the indorsement and delivered the goods in pursuance thereof to the indorsees as the persons entitled to the goods, and not to the defendant. Where by the terms of the bill of lading the goods are to be delivered to the consignee or his assigns, "he or they paying freight for the same," the master is not bound to insist on the payment of freight at the time of the delivery of the goods, but if he cannot get it from the consignee he may compel the consignor to pay it: *Shepard* v. *De Bernales* (*a*), *Domett* v. *Beckford* (*b*), Abbott on Shipping, p. 370, 11th ed. The indorsement gave the plaintiffs a right to compel the indorsees to pay the freight, but the plea does not allege any agreement that the defendant should be discharged by reason of the plaintiffs having accepted the liability of the indorsees. They are merely the receivers of the cargo for the defendant. Their acceptance of the goods may be a circumstance from which the jury may imply a contract on their part to pay the freight; but it does not discharge the defendant: *Wegener* v. *Smith* (*c*). [*Bramwell*, B.—Suppose the indorsement directed the plaintiffs to deliver the goods to the indorsees on payment of freight, but not otherwise, and not to look to the shipper for payment, would he not be discharged?] It would be a question for the jury whether the plaintiffs agreed to accept the liability of the indorsees in discharge of the defendant. The mere fact of the plaintiffs having waived their lien does not affect their rights against the defendant. He might have pleaded that the delivery and acceptance of the goods by the indorsees operated in

(*a*) 13 East, 565. (*b*) 5 B. & Adol. 521.
(*c*) 15 C. B. 285.

satisfaction and discharge of the plaintiffs' claim against him (*a*).

Watkin Williams, in support of the plea.—There was no contract with the defendant, and his liability depends entirely on the Bills of Lading Act (18 & 19 Vict. c. 111). The object of that Act was to transfer the liability for freight to the indorsee of the bills of lading, and it was never intended to retain the liability of the indorser in addition to that of the shipper. The plea states that it was provided by the charter-party that the plaintiffs should deliver the goods on being paid freight by the receivers of the cargo; and although the shipper may nevertheless remain liable, the defendant is neither the shipper nor the receiver of the cargo. The Bills of Lading Act imposed on the defendant, as consignee, an inchoate liability, which would only attach on the delivery of the goods to him, but which never attached by reason of his indorsing the bill of lading before the arrival of the goods. The bill of lading was indorsed with a direction to deliver the goods to the indorsees, looking to them for all freight, without recourse to the defendant; and the plaintiffs, by delivering the goods in pursuance of the indorsement, accepted the substituted liability of the indorsees. It was optional with the plaintiffs to accept this indorsement, but having done so and acted upon it, they have released the defendant from all liability for freight. It was a condition precedent to the defendant's liability to pay freight that the goods should be delivered to him, but they were delivered to another person under an express stipulation that the de-

(*a*) The learned counsel was about to argue that the facts stated in the plea afforded no answer to the plaintiffs' claim for primage and average, when *Watkin Williams*, for the defendant, elected to amend the plea by inserting the words, "except as to primage and average."

1866.
LEWIS v. McKER.

fendant should not be liable. *Shepard* v. *De Barnales* (a) and *Domett* v. *Beckford* (b) proceeded on the ground that the clause in the bill of lading "he or they paying freight for the said goods" was for the benefit of the master. It is in accordance with the spirit and intention of the Act to make bills of lading as negotiable as possible, by enabling shipowners to recover freight from the receivers of the cargo.

Karslake replied.

KELLY, C. B.—This case has been ably and concisely argued, but in my opinion it presents no question of real doubt for the consideration of the Court.

The action is brought against the consignee of certain goods under a bill of lading, and unquestionably, upon the facts stated in the declaration, the defendant was originally contingently liable to the plaintiffs for the freight of these goods. I say contingently, because circumstances might arise which would prevent the plaintiffs from making any claim against him in respect of the freight.

Such being the state of the case, the plea alleges that during the voyage, and before the time for the delivery of the cargo, the defendant indorsed the bill of lading to certain persons, with a direction to "deliver to them or order, looking to them for all freight, &c., without recourse to us." The plea then states that the plaintiffs accepted the indorsement and delivered the goods in pursuance thereof to the indorsees, as the persons entitled to them, and not to the defendant. Now, I agree that if this were only a statement of facts which would have raised a question for the consideration of a jury, and which a Judge

(a) 13 East, 565. (b) 5 B. & Adol. 521.

would have been bound to leave to them, the plea would have been insufficient. For it is not enough merely to state facts which *might* constitute a defence to the action, but a defence must be stated in positive terms. But I am of opinion that if the consignee of goods under a bill of lading, whilst the goods are in transitu, indorses the bill of lading, and upon that indorsement states in express terms that the owner of the freight is to look to the indorsee and not to the consignee of the goods, and the indorsement is accepted and acted upon without any objection or qualification on the part of the owner of the freight, that in point of law constitutes a transfer of the liability and a defence to any action against the consignee.

Under these circumstances, in my opinion, the plea contains a state of facts which are of themselves an answer to the action, and not merely evidence from which a jury *might* find that there was an answer. I therefore think the plea good, and that the defendant is entitled to judgment.

BRAMWELL, B.—I am of the same opinion; and I must say that I do not think any the worse of the plea because it states the actual facts rather than conclusions of law which involve, first of all, proof before a jury of the existence of the facts, and then the difficult question whether the conclusion of law has been correctly deduced from them.

It seems to me that the facts stated in this plea furnish an answer to the action on the grounds mentioned by the Lord Chief Baron; and I will merely add, that what has taken place is to my mind equivalent to the defendant having said: "Deliver to Messrs. Watney & Keene upon those terms or do not deliver to them at all." That being so, the owners of the freight might have said: "We will

1866.
LEWIS
v.
McKEE.

not deliver at all. We do not like to take the responsibility of Messrs. Watney & Keene to the exclusion of yours as consignee." It appears to me that if this reasoning were not well founded great mischief would ensue; for when a consignee of goods desires to entrust them to a wharfinger or warehouseman and make him solely liable for the freight, what course is he to adopt if he does not make such an indorsement as this? The owner of the freight may refuse to act upon the indorsement, but if he accepts the nominee for receiving the goods he must take him upon the terms on which he is nominated, which in this case are that no further liability shall attach to the defendant.

CHANNELL, B.—I am also of opinion that the defendant is entitled to judgment. The question is, not whether the plea might not have been differently framed, but whether the facts stated in it afford a sufficient answer to the plaintiffs' claims for freight. It would not perhaps be sufficient that the facts should be such as would justify the inference that the plaintiffs had renounced their claim for freight against the defendant; but the question is, whether the facts are so stated as to require that conclusion. I am of opinion that they are. The plaintiffs might have refused to act upon this order. I do not say what would have been the result if they had done so, but the plea shews that they delivered on the faith of this order, and that they renounced their claim against the defendant for freight. The plea states that the plaintiffs accepted the indorsement and delivered the goods to the assignees, as the persons entitled to them, and not to the defendant. That excludes the notion that the goods were delivered to the indorsees simply as the agents of the defendant.

1866.

LEWIS v. MCKEE.

PIGOTT, B.—I am of the same opinion. If the facts stated were such as might or might not be evidence of a substituted liability, I agree that the plea would be bad. But it seems to me that in point of fact they shew a good substituted liability.

Judgment for the defendant.

WOOD and Another *v.* PRIESTNER.

Nov. 23.

The defendant's son was indebted to the plaintiffs in the sum of 170*l.*, being the aggregate of several monthly accounts for coal supplied. The plaintiffs having refused to supply any more coal unless the accounts were settled, the defendant paid them 9*l.*, gave them a bill of exchange for 61*l.*, and the following guarantee, signed by his father:—"In consideration of the credit given by the H. G. Coal Company (the plaintiffs) to my son, J. P., for coal supplied by them to him I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*; and in default of his payment of any account due I bind myself by this note to pay to the H. G. Company whatever may be owing, to the amount not exceeding the sum of 100*l.*"—*Held*, that this was a continuing guarantee, and applied to *future* as well as the accounts then due.

DECLARATION.—That the defendant, on, &c., signed and delivered to the plaintiffs the following guarantee:—

"Wilmslow, June 10, 1861.

"In consideration of the credit given by Messrs. The Hindley Green Coal Company to my son, Mr. James Priestner, for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his non-payment (*a*) of any accounts due, I bind myself, by this note, to pay to the Hindley Green Coal Company whatever may be owing to an amount not exceeding the sum of 100*l.*

"William Priestner."

Averments.—That the plaintiffs thereupon afterwards, in pursuance thereof, gave the said credit to the defendant's said son for coals which had been theretofore supplied by them to him, and after the making of the said guarantee, and in pursuance thereof, they supplied on credit further

(*a*) Sic.

1866.
WOOD
v.
PRIESTNER.

coals to the defendant's said son, and that accounts for coals so supplied exceeding 100*l.* became and were still due and owing from the defendant's son to the plaintiffs in respect thereof: that defendant's son made default in payment thereof: that plaintiffs did all things necessary, &c.—Breach: that the defendant's son has not nor has the defendant paid the same, or any part thereof, and the same, to the extent of 100*l.*, remains due and unpaid, &c.

Plea (inter alia).—That the defendant did not guarantee as alleged.—Issue thereon.

At the trial, before *Martin*, B., at the last Manchester Summer Assizes, it appeared that the plaintiffs, who carried on business as coal merchants under the style of "The Hindley Green Coal Company," had, prior to and in the year 1861, supplied coals to the defendant's son, a coal dealer at Wilmslow. The accounts were stated monthly; and in June, 1861, the defendant's son was indebted to the plaintiffs in the sum of 170*l.*, viz., in 70*l.* for coals supplied in the previous March; in 62*l.* 4*s.* for coals supplied in April, and in 37*l.* 16*s.* for coals supplied in May. The two former accounts were then due, but the May account would not become due until the end of June. On the 8th of June the defendant's son paid 9*l.* on account. The plaintiffs having refused to supply any more coal unless the defendant's son gave them security for the amount due, he accepted a bill of exchange drawn by them upon him for 61*l.*, at three months date, and gave them the guarantee set out in the declaration, signed by his father. Thereupon the plaintiffs continued to supply him with coal until 1865, when he died, insolvent, owing them more than 100*l.* The amount due at the time the guarantee was given had been paid.

It was submitted, on behalf of the defendant, that this was not a continuing guarantee.

The learned Judge directed a verdict for the plaintiffs for 100*l.*, reserving leave to the defendant to move to enter a nonsuit.

Holker, in the present Term, obtained a rule nisi accordingly; against which

E. James and *Baylis* now shewed cause.—The guarantee, being ambiguous, must be construed with the light of surrounding circumstances: *Carr* v. *Montefiore* (*a*). The defendant's son being indebted to the plaintiffs, they refused to supply him with any more coal unless they had security. When they received the guarantee they continued to supply him with coal, thereby indicating that their intention was that the guarantee should be a security, not only for the amount then owing, but also for what might become due in respect of future and continuing supplies of coal. The words "in consideration of the credit given" mean "in consideration of credit to be given;" and the words "for coal supplied" mean "for coal to be supplied." If the words "credit given" meant "credit already given," there would be no consideration; for past debts are not a sufficient consideration for a guarantee of such debts; but giving credit in future will support a promise to guarantee all debts, past as well as future. So also the words "any accounts due" mean "any accounts which may hereafter become due; and the words "whatever may be owing" mean "whatever may now or at any future time be owing." In *Kennaway* v. *Treleavan* (*b*), where the language of the guarantee was ambiguous, it was construed as applying to future as well as past transactions. In *Hoad* v. *Grace* (*c*) it was held that the expression "for goods sup-

(*a*) 5 B. & S. 408. 425. (*b*) 5 M. & W. 498.
(*c*) 7 H. & N. 494.

1866.
WOOD
v.
PRIESTNER.

plied" did not necessarily import a past consideration, and ought to be read "for goods to be supplied."

Holker, in support of the rule.—No doubt, where an instrument is ambiguous, the intention of the parties must be ascertained from its language construed by the light of surrounding circumstances. So construing this guarantee, it applies to past transactions only. At the time it was given the defendant's son was indebted to the plaintiffs in the sum of 170*l.* for coal supplied, and they were willing not to enforce immediate payment if they received some security for the debt. The words "in consideration of credit given" mean "in consideration of forbearance to press for payment; and the words "for coal supplied" mean "for coal already supplied." It would be a forced construction to make these words applicable to a future supply. The only expression which points to a future consideration is "any accounts due;" but bearing in mind that the debt of 170*l.* consisted of the aggregate of several monthly accounts, the defendant guaranteed that if his son failed to pay *any* of them he would pay them to an amount not exceeding 100*l.* In *Allnutt* v. *Ashenden* (*a*) the defendant guaranteed an "account" for wines and spirits; and there being an existing account at the time the guarantee was given, it was held that it did not extend to future supplies of goods. *Nicholson* v. *Paget* (*b*) is also an authority in the defendant's favour. There *Bayley*, B., said "that it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself." In *Hood* v. *Green* the question arose upon demurrer to a plea which set out the guarantee. The

(*a*) 5 Man. & G. 392. (*b*) 1 C. & M. 48.

declaration stated that it was a guarantee for a future debt; and as the plea did not allege that there was any existing debt the guarantee could only apply to a future transaction. [*Pigott*, B., referred to *Goldshede* v. *Swan* (*a*).]

KELLY, C. B.—I am of opinion that this is a continuing guarantee, and that the plaintiffs are entitled to retain the verdict. The question in these cases does not depend solely on the words of the instrument; if they are ambiguous, it is necessary to look at the surrounding circumstances, and apply them to the language used.

Then let us look at the guarantee and the facts as they existed at the time it was given. It begins thus:—"June 10, 1861. In consideration of the credit given by Messrs. The Hindley Green Coal Company to my son, Mr. Thomas Priestner, for coal supplied by them to him, I hereby hold myself responsible to them as a guarantee." If this had been a guarantee in consideration of credit already given, and had been intended to be confined to the amount already due, the language would have been "in consideration of your forbearance to sue for the amount payable by my son, I hereby guarantee," &c. Then what are the surrounding circumstances? The plaintiffs had supplied the defendant's son at various periods with coal to the amount of 170*l.* 9*l.* was paid on account, leaving 161*l.* due. The plaintiffs then refused to supply any more coal unless they had some security, and the defendant accepted a bill of exchange for 61*l.*, and obtained his father's signature to the guarantee in question.

Now we must assume that it was the intention of the parties that the supply of coal should continue, because immediately the guarantee was given the plaintiffs con-

(*a*) 1 Exch. 154.

1866.
WOOD
v.
PRIESTNER.

tinued to supply coal for a considerable time, and until more than 100*l.* was due. Looking at the surrounding circumstances, I am at a loss to understand why, when 9*l.* was paid, 61*l.* secured by a bill of exchange, and 100*l.* due, if the intention was that the defendant's father should become a surety for the 100*l.* only, it would not have been sufficient for him to have given the plaintiffs a promissory note for that amount.

The guarantee proceeds:—"I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his non-payment of any accounts due, I bind myself by this note to pay to the Hindley Green Coal Company whatever may be owing to an amount not exceeding the sum of 100*l.*" Mr. *Holker* says that the 170*l.* consisted of an aggregation of several accounts, and therefore the word "accounts" was used. But the guarantee not only uses the words "any accounts due," but also the words "whatever may be owing." Then does that mean that the instrument is to be a guarantee to the amount of 100*l.* upon the accounts due when the guarantee came into operation, or that the instrument is to be a guarantee to the amount of 100*l.* upon any accounts which may thereafter be owing? In my opinion the true meaning is that the instrument is to be a guarantee, not merely for the specific sum of 100*l.* then due, but (inasmuch as the defendant's son was to be supplied with goods thereafter) also a guarantee for any accounts which might thereafter be owing, to the extent of 100*l.* I do not understand how the expression "whatever may be owing" can be applied to the specific sum of 100*l.* which was then due: whereas it has a natural and intelligible application to any sum or sums which might thereafter become due.

Under these circumstances, though I am far from saying

that the case is not susceptible of argument, or without doubt, I think that this is a continuing guarantee, and that the rule must be discharged.

MARTIN, B.—I do not mean to dissent from the judgment of the Lord Chief Baron, but I think this by no means a clear case. (His lordship then stated the facts.) The defendant knew nothing whatever of the transactions between his son and the plaintiffs, and therefore, if the defendant is liable, it must be a liability upon the guarantee itself. Now, looking at the existing circumstances, viz., that there was a debt of 170*l.*, that 9*l.* was paid, and a bill given for 61*l.*, leaving 100*l.* due, I am not prepared to say that Mr. *Holker's* argument is wholly unfounded. On the other hand, the words of the instrument are not so clear that they may not be read in the manner contended for by the plaintiffs' counsel. I cannot assent to the opinion expressed by *Bayley*, B., in *Nicholson* v. *Paget*, that a guarantee is a contract of a peculiar description. It seems to me that it ought to be construed in the same manner as any other contract.

BRAMWELL, B.—I am also of opinion that the rule ought to be discharged. I have difficulty in saying that this is a clear case. It may be one of those cases which are referred to as shewing the uncertainty of the law, whereas they only shew the stupidity of people in not taking care to express themselves plainly, and make intelligible contracts.

Upon consideration, I have come to the conclusion that this is a continuing guarantee. In order to interpret such an instrument the surrounding circumstances not only may, but must be regarded. In this case, the defendant's son was indebted to the plaintiffs on certain accounts, which, on being delivered from time to time, were not paid, and a further dealing on credit was contemplated. Those are

1868.
WOOD
v.
PRINTER.

the only circumstances which, in my opinion, are material to be looked at. Then what is the language of the instrument? "In consideration of the credit given." If that related to a *past* debt, it must also relate to a *past* credit, and then the guarantee would be invalid for want of consideration, and no parol evidence admissible by the Mercantile Law Amendment Act (*a*) would render it good. It would be equivalent to this: "On account of the credit you have already given my son, I guarantee," &c. There is a presumption against the defendant giving and the plaintiffs receiving an invalid document when the law upon the subject is so familiar.

It has been argued that the expression "in consideration of the credit given" means "in consideration of the time you have agreed to give for payment of the debt." But that would be altering the words, and if it were as contended in all probability some time would have been specified. After the case of *Goldshede* v. *Swan* (*b*) I cannot say that "credit given" may not be construed in a future sense, though it is by no means the usual expression. The more usual expression is "in consideration of your giving credit," which may be for weeks, or months, or years. I think the meaning is "in consideration of the credit you are going to give for the supply of coal to my son."

It is argued that the plaintiffs' construction would alter the words of the guarantee, but I do not think they require to be altered. The word "credit" is used in its ordinary sense, as, for instance, when a person says to a coal merchant, "I wish you to supply me with coal; is any credit given?" To which the reply might be, "Yes, there is credit for a month; and if you deal with me you shall have credit for that period for the coal supplied."

(*a*) 19 & 20 Vict. c. 97, s. 3. (*b*) 1 Exch. 154.

The guarantee goes on: "I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his nonpayment of *any accounts due*," &c.—It cannot mean "any accounts now due," because default had been already made in payment of them. The natural meaning is any fresh accounts, which are not paid when they become due.—"I bind myself to pay whatever may be owing to an amount not exceeding 100*l.*" If it were otherwise the proper expression would have been "I bind myself to the extent of 100*l.* to pay the accounts now due." In construing this guarantee I am not sure whether we should be justified in having recourse to what may possibly occur to any person's mind, but I cannot help observing that if this guarantee were confined to a past transaction it would be idle; for, the old debt being secured, the creditor would say, "You must pay the new and unsecured debt first, and he would appropriate the payments to that debt." For these reasons I think we ought to construe this as a continuing guarantee, for whether the defendant did or did not intend it, such is the natural construction of its language.

PIGOTT, B.—Although I entertained some doubt, I have come to the same conclusion. I was struck with the fact adverted to that the account was made up at the time the guarantee was given, and that 100*l.* was the balance due after deducting the sum paid and the amount secured by the bill of exchange. I should have been more disposed to construe this as a guarantee for the debt already due if it had been an odd sum. The language being ambiguous, we must construe the instrument by the light of surrounding circumstances, and so doing I have come to the conclusion that it is capable of applying to a continuing transaction.

Rule discharged.

1866.

Nov. 26.

CLAY *v.* OXFORD and Others.

Where an action has been brought in the name of a person who was dead at the time the writ of summons issued, the Court has no power to amend the writ by substituting the name of his legal representative.

THIS action was commenced on the 10th of May, 1866, in the name of John Clay as plaintiff. The declaration was delivered on the 1st of June, and it was afterwards discovered that John Clay had died before the writ of summons issued. On the 7th of November a summons was taken out at Chambers to amend the writ by striking out the name of John Clay and inserting therein the names of his executors. *Martin*, B., before whom the summons was heard, made an order accordingly. A witness who was about to go abroad had been examined before a Master of the Court, in pursuance of a Judge's order, and it was desired to continue the action in order that his depositions might be read at the trial.

J. A. Russell, in the present Term, obtained a rule nisi to rescind the order of *Martin*, B., against which

T. Jones now shewed cause.—The amendment might have been made at common law. There is no difference in principle between adding the name of another plaintiff and substituting that of an executor. In *Carne* v. *Malins* (*a*) the Court allowed the writ and subsequent proceedings to be amended by adding the names of other parties as co-plaintiffs, in order to save the Statute of Limitations. In *Brown* v. *Fullerton* (*b*) the Court, for the same reason, allowed the plaintiffs, assignees of a bankrupt, to amend the writ and subsequent proceedings by adding the name of the official assignees. But at all events the Court has

(*a*) 6 Exch. 803. (*b*) 13 M. & W. 556.

power to make the amendment under the 222nd section of the Common Law Procedure Act, 1852. In *Blake* v. *Done* (a) the Judge at the trial of an action of ejectment amended the writ by adding the names of two trustees in whom the legal estate vested; and this Court held that he had power to make the amendment. There it was argued that there was no "existing suit" in which the parties were trustees; but that objection did not prevail. The judgment of *Pollock*, C. B., in that case is an express authority in favour of this order. Where a foreign bank sued in a corporate name by which it was known, and the defendant pleaded that it was not a body corporate, this Court allowed the writ, declaration and subsequent proceedings to be amended by inserting the name of a director of the bank as nominal plaintiff, it appearing that by the law of the country the bank was entitled to sue in his name: *La Banca Natzionale sede di Torino* v. *Hamburgher* (b). In *Coombs* v. *The Bristol and Exeter Railway Company* (c) the writ was amended by substituting the name of the Company for that of their secretary.

J. A. Russell appeared in support of the rule, but was not called upon to argue.

KELLY, C. B.—It may perhaps be regretted that the Common Law Procedure Act, 1852, has not authorized us to amend writs by substituting the name of a personal representative for that of a party who was dead when the writ issued. It has not, however, done so; and I am of opinion that we have no power at common law to make such an amendment. If we did, it would be creating a new plaintiff on the record, and giving effect to proceed-

(a) 7 H. & N. 465. (b) 2 H. & C. 330
(c) 1 F. & F. 206.

1866.
CLAY
v.
OXFORD.

ings in the name of a plaintiff who never existed, and which are in fact a nullity. The 34th and some subsequent sections enable the Court, in the case of nonjoinder and misjoinder, to amend the proceedings by adding or striking out the names of plaintiffs or defendants, and the 136th and some subsequent sections enable the legal representatives of a deceased plaintiff or defendant to continue the proceedings. But the Act contains no provision for substituting the legal representatives of a person who was dead at the time the writ was issued in his name, and consequently was never a party to the suit. The rule must therefore be absolute.

BRAMWELL, B.—I am of the same opinion. It seems to me that this amendment is neither within the words or the intention of the Act. This is altogether a different case from *Blake* v. *Done* (*a*) and *La Banca Natzionale sede di Torino* v. *Hamburgher* (*b*). Those were cases in which persons had brought actions to try some question in which they had an interest, but who were not formally the right parties on the record. Here the action is brought in the name of a person who died before the writ issued. It cannot be said that this amendment is "necessary for the purpose of determining in the existing suit the real question in controversy between the parties;" for there is no plaintiff, and therefore no existing suit and no controversy between the parties. If this had been the case of a person who had a beneficial interest in the subject-matter of the suit, though not entitled to sue in his own name, it would have been within the principle of the authorities cited; but the power of amendment cannot extend to cases in which there is no party suing. In my judgment, therefore, this rule ought to be made absolute.

(*a*) 7 H. & N. 465. (*b*) 2 H. & C. 330.

1866.

CLAY v. OXFORD.

CHANNELL, B.—I concur with the rest of the Court that the rule ought to be absolute. We have no jurisdiction under the Act to make such an amendment. The sections prior to the 222nd do not affect the case, and the power to amend can only be claimed under that section. But it does not in terms provide for such a case as this; and as in the earlier sections the authority to add or strike out parties is conferred with great care and accuracy, we must infer that the power was not intended to be given by the 222nd section.

PIGOTT, B.—I was at first disposed to think that we might have power to make the amendment under the 222nd section; but, looking more carefully into the Act, and seeing its express provisions in the case of nonjoinder and misjoinder of parties, I have come to the conclusion that the 222nd section does not confer on us any such power.

Rule absolute.

HANDLEY v. FRANCHI.

Nov. 22.

An affidavit by a plaintiff, to hold to bail by Judge's order under the 1 & 2 Vict. c. 110, stated that "the defendant is well and truly indebted to me in the sum of 182*l.* for money lent, and goods sold and delivered."—*Held* insufficient.

IN this case the defendant had been held to bail by a Judge's order under the 1 & 2 Vict. c. 110, s. 3. The order was obtained on an affidavit of the plaintiff, which (so far as material) was as follows:—

"The above named defendant is well and truly indebted to me in the sum of 182*l.* 2*s.* for money lent and goods sold and delivered."

Garth had obtained a rule calling on the plaintiff to

1866.
HANDLEY v. FRANCHI.

shew cause why the bail bond should not be delivered up to be cancelled on the ground that the affidavit did not state the cause of action with sufficient precision.—He cited *Taylor* v. *Forbes* (*a*).

C. Butt now shewed cause.—It appears with sufficient certainty that a debt is due from the defendant to the plaintiff. No doubt the affidavit would have been more formal if it had stated that the money was lent and the goods sold "by the plaintiff to the defendant;" still the statement of the cause of action is sufficiently precise. In *Moultby* v. *Richardson* (*b*) an affidavit "that the defendant was indebted to the plaintiff in such a sum, *as he computes it*," was held sufficient. So in *Tyler* v. *Campbell* (*c*) an affidavit that the defendant was indebted to the plaintiff "on the balance of an account stated," was held sufficient, without adding "and settled between them." [*Channell*, B. —There the affidavit was in the form of a count upon an account stated given by the rules of Trinity Term, 1 Wm. 4.] It did not state that the account was stated "between the parties."

Garth appeared to support the rule, but was not called upon to argue.

KELLY, C. B.—I am of opinion that the rule ought to be absolute. If we were to hold this affidavit sufficient, any person might be deprived of his liberty by a simple oath that he was indebted to the party seeking to arrest him. In cases of this kind enough should appear on the face of the affidavit to enable the party arrested to maintain an

(*a*) 11 East, 315. (*b*) 2 Burr. 1032.
(*c*) 3 Bing. N. C. 675; 4 Scott, 384.

indictment for perjury if it should turn out that there was no such cause of action as that sworn to.

CHANNELL, B.—I am of the same opinion. This affidavit would have been insufficient under the law as it existed prior to the 1 & 2 Vict. c. 110; and now that arrest on mesne process is abolished by that statute, except in the case of a Judge's order, we ought not to allow greater laxity than formerly prevailed in affidavits to hold to bail.

PIGOTT, B.—I am disposed to think that the statement that the "defendant is well and truly indebted to me" for money lent &c., sufficiently shews that the money was lent "by the plaintiff to the defendant;" but in deference to the opinion expressed by the other members of the Court I agree that the rule ought to be absolute.

Rule absolute.

WARBURTON v. THE GREAT WESTERN RAILWAY COMPANY.

Nov. 17.

THE declaration stated that the defendants by their servants so negligently and unskilfully drove and managed

The plaintiff, a servant in the employ of the London and North Western Railway Company, was at work at a station in Manchester, when an engine driver in the employ of the defendants, the Great Western Railway Company, shunted a train belonging to the defendants from one part of the station to another so negligently that the plaintiff was thereby injured. The station was the property of the London and North Western Railway Company, and was used in common by that Company and the defendants and other Companies. By arrangement between all these Companies the defendants' engine driver ought to have awaited a signal from an officer of the London and North Western Railway Company before he shunted the train.—*Held*, that the plaintiff and the engine driver were not fellow servants within the rule of law that a master is not in general responsible to his servant for injury occasioned by the negligence of a fellow servant in the course of their common employment.

1866.

WARBURTON v. GREAT WESTERN RAILWAY CO.

an engine and a train of carriages attached thereto, upon and along a certain railway which the plaintiff was then lawfully upon, that the said engine and train of carriages were driven and struck against the plaintiff, whereby the plaintiff was thrown against a certain train that was then standing on the said railway, and was crushed, wounded and permanently injured, and was prevented from attending to his employment, &c.

Plea.—Not Guilty. Issue thereon.

At the trial before *Martin*, B. at the last Manchester Summer Assizes, the following facts appeared:—The plaintiff was a servant in the employ of the London and North Western Railway Company, and was at work at the Victoria Station in Manchester, when an engine driver in the employ of the defendants, the Great Western Railway Company, having entered the station, shunted a train belonging to the defendants from one part of the station to another, and in so doing was guilty of the negligence complained of. The station was the property of the London and North Western Railway Company, and was used in common by the plaintiffs' Company, and the defendants' and other Companies. By an arrangement between these Companies, the defendants' engine driver ought to have awaited a signal from an officer of the London and North Western Railway Company before he shunted the train into the siding; but without doing so, and without any signal at all, he shunted the train, and negligently caused the injury in question to the plaintiff.

The defendants' counsel contended that the plaintiff could not recover, inasmuch as he and the engine driver were fellow servants, within the rule of law that a master is not responsible to one servant for an injury occasioned to him by the negligence of a fellow servant whilst they are engaged in one common employment.

The learned Judge was of opinion that there was no rule of law which prevented the plaintiff from recovering, and the jury found a verdict for him, with 150*l.* damages.

Brett, in the present Term (*a*), moved for a rule nisi for a new trial, on the ground of misdirection.—The defendants' engine driver and the plaintiff were fellow servants engaged in one common employment under the direction of the same station master, and subject to the same regulations and orders. The test of common employment is not whether the two servants are doing work with a common object, but whether they are under the same controul: *Sadler* v. *Henlock* (*b*), *Abraham* v. *Reynolds* (*c*). In *Wiggett* v. *Fox* (*d*) the defendants, who had contracted to execute certain works, employed a subcontractor, who employed the workman who was killed by the negligence of the defendant's men; and it was held that the subcontractor and his workmen were servants of the defendants engaged in one common employment with their other servants. The circumstance that the two servants were not paid by the same master is immaterial, for in *Degg* v. *The Midland Railway Company* (*e*) it was held that the rule of law that a master is not in general responsible to his servant for injury occasioned by the negligence of a fellow servant in the course of their common employment, applied to the case of a person who is injured whilst voluntarily assisting the servants in their work. In *Vase* v. *The Lancashire and Yorkshire Railway Company* (*f*) the rule of law did not apply to the facts of the case. Moreover, if either Company is liable, it is the London and

(*a*) Nov. 6. Before *Kelly*, C.B., *Martin*, B., *Channell*, B., and *Pigott*, B.
(*b*) 4 E. & B. 570.
(*c*) 5 H. & N. 143.
(*d*) 11 Exch. 832.
(*e*) 1 H. & N. 773.
(*f*) 2 H. & N. 728.

1866.
WARBURTON v. GREAT WESTERN RAILWAY CO.

North Western Railway, for the station was their property and under their controul: *Murphey* v. *Caralli* (*a*).

Cur. adv. vult.

The judgment of the Court was now delivered by

KELLY, C. B.—This was an action tried before Baron *Martin*, in which the verdict was for the plaintiff, and a motion made before my brothers *Channell*, *Pigott* and myself.

This action was for negligence by the servant of the defendants, whereby the plaintiff sustained injury.—(His lordship then stated the facts as above set forth.)—The defendants were no doubt primâ facie liable for the negligence of their servant; but it was contended that, under the circumstances before mentioned, the plaintiff and the engine driver must be taken to have been servants engaged under one master in one common employment; and that therefore, upon the authority of several cases lately decided, the defendants were not liable for the act of their servant. The principle, or rather the proposition of law established by these cases is, that where two or more persons are the servants of one master and engaged in one common employment, the master is not liable to an action for any injury sustained by one servant by reason of the negligence of another in the work or employment which is common to both, or incidental to the carrying on of the general business, or the operations in which the one and the other are engaged. And the ground upon which these decisions have been pronounced is, that it must be presumed that a servant takes upon himself the risk of any injury he may sustain by the negligence of another servant under the same master and in the same employment, and that such

(*a*) 3 H. & N. 462.

1866.

WARBURTON v. GREAT WESTERN RAILWAY CO.

risk is part of the consideration for the wages which he is entitled to receive. The proposition to the extent to which I have stated it, and which is to be deduced from the case of *Morgan* v. *The Vale of Neath Railway Company* (*a*), and many other authorities, has now become established law. But we are of opinion that, inasmuch as the injury sustained by the plaintiff was occasioned by the servant of the defendants, not in the course of any common employment or operation under the same master, but by the negligence of the servant of the defendants in the discharge of his ordinary duty to the defendants alone, this case is distinguishable from all which have been decided in relation to the above doctrine of exemption, and that therefore this action is maintainable.

Rule refused.

(*a*) 5 B. & S. 570. 736.

COLEMAN *v.* THE SOUTH EASTERN RAILWAY COMPANY.

Nov. 17.

The plaintiff, a boy twelve years of age, had entered a third class railway carriage at night time, and was about to seat himself when he placed his fingers on a part of the door. His father was behind him getting into the carriage when a porter violently closed the door, which crushed the plaintiff's fingers and struck his father on the back.—*Held*, that there was evidence of negligence on the part of the porter, which was properly submitted to the jury, and that there was no contributory negligence on the part of the plaintiff: Per *Martin*, B., *Channell*, B., and *Pigott*, B.: Dissentiente *Kelly*, C. B.

DECLARATION.—For that the plaintiff was received by the defendants as a passenger to be carried by them for reward, and the defendants, by their servants, conducted themselves so negligently and carelessly in and about the closing a carriage door into which the plaintiff was getting to be carried as a passenger that the said door came against and upon the fingers of the plaintiff, whereby, &c.

Plea, not guilty.—Issue thereon.

At the trial, before *Martin*, B., at the Middlesex Sittings

1866.

COLEMAN v. SOUTH EASTERN RAILWAY CO.

after last Trinity Term, the following facts were proved on behalf of the plaintiff.—About half-past nine on the evening of the 13th of May, in the present year, the plaintiff, a boy of twelve years of age, was at the Charing Cross Station of the defendants' railway, in the company of his father, mother and two sisters, intending to travel on the defendants' line to Deptford. The father assisted the mother and sisters of the plaintiff into the carriage. All the seats were then occupied except two, one on each side of and next the door. The father lifted the plaintiff into the carriage, who endeavoured to seat himself by taking hold of the framework. The father immediately followed, and before he had entered the carriage a porter, who came along closing the doors, violently shut the carriage door in which the plaintiff was, striking the father on the back and crushing the fingers of the plaintiff. There was conclusive evidence that the plaintiff had not taken his seat at the time of the accident, and that he was using the framework of the carriage for the purpose of taking his seat. The carriage was a third class, and there were no straps or bands by which the plaintiff could assist himself. There was a lamp in the carriage which reflected a very dim light.

At the close of the plaintiff's case, it was submitted on behalf of the defendants that there was no evidence to go to the jury. The learned Judge was inclined to that opinion, but left the case to the jury, reserving leave to the defendants to move to enter a nonsuit or a verdict for them, if the Court should be of opinion that there was no evidence to support the plaintiff's case. The jury found a verdict for the plaintiff, damages 5*l.*

Bullen, in the present Term, obtained a rule nisi accordingly on the grounds, first, that there was no evidence of any negligence on the part of the defendants' servant; and secondly that, if there was such evidence, the plaintiff was

not entitled to recover inasmuch as he was guilty of contributory negligence.—He cited *Tuff* v. *Warnan* (*a*).

Willis now shewed cause.—First, there was evidence of negligence on the part of the defendants' servant. It is consistent with the evidence that the defendants' servant saw the plaintiff endeavouring to take his seat. If he did not, he was bound to allow the passengers a reasonable time to seat themselves. Here the father, who lifted the plaintiff in and immediately followed him, was struck in the back by the carriage door, so that the plaintiff had not sufficient time to take his seat. The servant must have seen the father lifting the plaintiff into the carriage. With respect to contributory negligence it is admitted that if the plaintiff by the exercise of ordinary care could have avoided the consequence of the defendants' negligence he cannot recover. But it is submitted that when the wrongfulness of the plaintiff's conduct depends upon circumstances, whether those circumstances exist or not is a question of fact for the jury. If the act of the plaintiff is wrongful irrespective of surrounding circumstances, then if it has induced the mischief complained of the Judge would be justified in nonsuiting, as in *Senior* v. *Ward* (*b*), where the plaintiff voluntarilyd escended into a mine by apparatus which he knew to be unsafe and unfit for service; as also in *Morgan* v. *Allerton* (*c*), where the plaintiff, a boy seven years old, put his fingers on the cogs of the wheels of a machine exposed in a public market without being in the care of any person. Therefore, unless the Court can say that a passenger's putting his hand upon the framework of the carriage is under all circumstances a wrongful act, the question must be submitted to

(*a*) 5 C. B. N. S. 573. (*b*) 1 E.& E. 385.
(*c*) 4 H. & C. 388.

1866.
COLEMAN v. SOUTH EASTERN RAILWAY CO.

the jury. Here the learned Judge did submit the question to the jury, and they found that under the circumstances the act of the plaintiff was not wrongful, and that he ought not to be considered as the author of his own injury.

Bullen, in support of the rule.—The learned Judge ought to have nonsuited the plaintiff. The question in cases of this kind is whether the injury was occasioned entirely by the negligence or improper conduct of the defendants, or whether the plaintiff himself so far contributed to the misfortune by his own negligence, or want of ordinary or common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened: *Tuff* v. *Warnan* (*a*). Here, assuming there was negligence on the part of the servant of the Company, there was contributory negligence on the part of the plaintiff. He did not use ordinary care and caution in getting into the carriage, but negligently placed his hand where it must inevitably be crushed by the closing of the door. It is submitted, however, that there was no negligence on the part of the servant of the Company. He was merely acting in the performance of his duty in closing the door. In the absence of any evidence of negligence on the part of the Company, they are clearly not responsible: *Singleton* v. *The Eastern Counties Railway Company* (*b*).

KELLY, C. B.—I am of opinion that there was no evidence of negligence on the part of the servant of the Company, and that there was evidence of negligence on the part of the plaintiff. The carriage was not in motion, the plaintiff had entered it, and there was time enough for him to have seated himself. His father followed him, and

(*a*) 5 C. B. N. S. 573. (*b*) 7 C. B. N. S. 287.

the whole of the boy's person was within the carriage, when a servant of the Company closed the door, and thereby crushed the plaintiff's fingers which he had negligently placed on the framework of the door. I do not attach much importance to the fact that the servant shut the door with violence. Possibly, if he had closed it in such a manner as to have forced the plaintiff's fingers where they were, the Company might have been liable.

As regards the question of contributory negligence, I think that there was evidence of negligence on the part of the plaintiff. The putting his fingers where he did is, in my opinion, conclusive evidence of negligence. I cannot think that, without a vis major, any person is justified in putting his fingers on the framework of a door, so that when the door is closed they must inevitably be crushed. It seems to me that there is no difference in this respect between a boy of twelve years of age and a man of forty. If the plaintiff, seeing his father get into the carriage and knowing that when his father was in the door would be closed, voluntarily puts his fingers in a place where they would in all probability be crushed, he himself is in fault. This is my view of the case, but I understand that my learned brothers entertain a different view.

MARTIN, B.—My present impression is that there was evidence to go to the jury, though I should have been better satisfied if they had found a verdict for the defendants. If I had nonsuited the plaintiff, I think that the Court would have considered that there was evidence which ought to have been submitted to the jury. First, there was the testimony of the boy himself. He had just got into a third class carriage, and his father was following him, when, in endeavouring to settle himself before he sat down, he placed his finger on the part of the door where it was crushed. Looking at it as a matter of law, I cannot say

1866.
COLEMAN v. SOUTH EASTERN RAILWAY CO.

that a boy, getting into a third class carriage at night, should put his finger on the framework of the door, was evidence of negligence; it might be that he was endeavouring to feel where he could get comfortably seated. Then there is the evidence that the porter shut the door with such violence that it struck the back of the boy's father, who was getting into the carriage. Judging by the amount of damage, the jury must have thought it a slight case, but if I had stopped it some of those who administer the law would have said that I was wrong.

CHANNELL, B.—I entertained some doubt in the course of the argument, and I am not now altogether free from doubt. I concur, however, in opinion with my brother *Martin*. No complaint is made against the finding of the jury: and I do not think it was the duty of the learned Judge to withdraw the case from their consideration.

PIGOTT, B.—I also entertained some doubt, but I am satisfied in the result that the learned Judge was right in leaving the case to the jury. The question is whether the porter was justified in shutting the door in the manner he did. That depends on circumstances. A passenger had just got into the carriage, but had not seated himself, and another passenger was in the act of getting in. I think the porter was guilty of negligence in shutting the door. Then comes the question of contributory negligence on the part of the plaintiff. It was night, the plaintiff was a boy, and he was feeling for a seat. I think that we must also take into account the construction of the carriage with reference to the door, which was very near the seat. Bearing in mind all these circumstances I think there was no contributory negligence on the part of the plaintiff.

Rule discharged.

1866.

WEALE, APPELLANT, *v.* BROWN, RESPONDENT.

Nov. 14.

Under the 28th section of "The Supplemental Customs Consolidation Act, 1855," which imposes a penalty of 100*l.* on every person found on board a ship "liable to forfeiture" under the Customs Acts, the condemnation of the ship by a Court of competent jurisdiction is not a condition precedent to a magistrate's power to convict in the penalty.

CASE stated by a Metropolitan police magistrate, under the 20 & 21 Vict. c. 43, for the opinion of the Court of Exchequer (so far as material) as follows :—

The respondent, Brown, was brought before the said magistrate in custody, and an information in the form given by the statute 16 & 17 Vict. c. 107 was exhibited against him by the appellant, Weale, an officer of the Customs, under the direction of the Commissioners of Customs, which stated that the respondent, "on the 16th of June, 1866, was found or discovered to have been on board a ship or boat within a port, bay, harbour, or creek of the United Kingdom, contrary to sect. 28 of the Supplemental Customs Consolidation Act, 1855, whereby the respondent had forfeited the sum of 100*l.*" (*a*).

(*a*) The case then set out the following sections of the "Supplemental Customs Consolidation Act, 1855" (18 & 19 Vict. c. 96).

Sect. 26.—"If any ship or boat shall be found or discovered to have been within any port, bay, harbour, river, or creek of the United Kingdom or the Channel Islands, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner any spirits, not being in a cask or other vessel capable of containing liquids of the size or content of twenty gallons at the least, or any tobacco or snuff, imported contrary to the prohibitions and restrictions contained in this or any other Act relating to the Customs, or any tobacco stalks, tobacco stalk flour, or snuff work, every such ship or boat, and such spirits, tobacco, snuff, tobacco stalks, tobacco stalk flour and snuff work shall be forfeited; but if it shall be made to appear to the satisfaction of the Commissioners of Customs that such spirits, tobacco, snuff, tobacco stalks, tobacco stalk flour, or snuff work were on board without the knowledge or privity of the owner or master of such ship or boat, and without any wilful neglect or want of reasonable care on their parts, then and in such case the said Commissioners

1866.
WEALE
v.
BROWN.

At the hearing of the above information before the police magistrate the respondent pleaded not guilty.

shall deliver up the said ship or boat to the owner or master of the same."

Sect. 27.—"Nothing herein contained shall extend to render any ship of one hundred and twenty tons burden or upwards liable to forfeiture on account of any tobacco, cigars, or snuff, if in whole and complete packages, each containing not less than eighty pounds net weight of such tobacco, cigars, or snuff; nor to render any ship of fifty tons burden or upwards liable to forfeiture on account of any tea, or of any spirits in glass bottles or stone bottles not exceeding the size of three pints each, such tea and spirits being really part of the cargo of such ship; nor to render any ship liable to forfeiture on account of any spirits or tea, or of any tobacco really intended for the consumption of the seamen or passengers on board during their voyage, and not being more in quantity than is necessary for that purpose; nor to render any ship liable to forfeiture if really bound from one foreign port to another foreign port, and pursuing such voyage, wind and weather permitting."

Sect. 28.—"Every person who shall be found or discovered to have been on board any ship or boat liable to forfeiture, under this or any other Act relating to the Customs, for being found or discovered to have been within any port, bay, harbour, river, or creek of the United Kingdom or of the Channel Islands, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner, such goods or things as subject such ship or boat to forfeiture, or who shall be found or discovered to have been on board any of her Majesty's ships or vessels, or on board any ship or vessel in her Majesty's employment or service, or on board of any foreign post-office packet, being a national vessel, employed in carrying the mails between any foreign country and the United Kingdom, such last mentioned ships, vessels, or packets being found or discovered to have been within any port, bay, harbour, river, or creek of the United Kingdom or the Channel Islands, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner any spirits not being in a cask or other vessel capable of containing liquids of the size or content of twenty gallons at the least, or any tobacco or snuff not being in a whole and complete package containing eighty pounds weight of such tobacco or snuff at least, shall forfeit the sum of one hundred pounds; and every such person shall and may be detained and taken before any justice, to be dealt with as hereinafter directed."

The case then set out the 226th

The magistrate found the following facts:—That a ship called the "Lady Brown" was on the 16th June in the port of London, and that it had on board on that day in the forecastle 22 lbs. 14 oz. of tobacco of foreign manufacture: that on the same day W. Mallett, an officer, went on board the said ship, and that when he did so the respondent was on board the said ship, and was found on board the same by the said W. Mallett.

The magistrate was of opinion that he had no jurisdiction to determine in the present proceedings whether the said ship was liable to forfeiture or not; and that, in the absence of any evidence that the said ship had been held liable to forfeiture in some Court of competent jurisdiction, it was his duty to order the respondent to be discharged from custody, which he accordingly did.

The question for the opinion of the Court is, whether, in the absence of such evidence of the forfeiture of the ship as aforesaid, he was justified in so discharging the prisoner.

section of the "Customs Consolidation Act, 1853" (16 & 17 Vict. c. 107).

Sect. 226.—"Whenever any ship, boat, or goods shall be seized as forfeited under this or any Act relating to the Customs, the seizing officer shall forthwith give notice in writing of such seizure and of the grounds thereof, to the master or owner of such ship, boat, or goods, if known, either by delivering the same to him personally, or by letter addressed to him at his place of abode, if known, and transmitted by post; and all ships, boats, or goods so seized under any law relating to the Customs shall be deemed and taken to be condemned, and may be sold, in the manner directed by law in respect to ships, boats, and goods seized and condemned for breach of any law relating to the Customs, unless the person from whom such ships, boats, and goods shall have been seized, or the owner of them, or some person authorized by him, shall, within one calendar month from the day of seizing the same, give notice in writing, if in London, to the person seizing the same, or to the secretary or solicitor for the Customs, and if elsewhere, to the person seizing the same, or to the collector, comptroller, or other chief officer of the Customs at the nearest port, that he claims the ship, boat, or goods, or intends to claim them."

1866.
WEALE v. BROWN.

If the Court shall be of opinion that he was not so justified, they will make such order as they think meet to them.

The Solicitor General (*Locke* and *Dowdeswell* with him), for the appellant.—A judgment of forfeiture of the ship was not necessary to give the magistrate jurisdiction to impose the penalty of 100*l.* under the 28th section of the "Supplemental Customs Consolidation Act, 1855" (*a*). Three courses are open under that Act: forfeiture of the ship, forfeiture of the goods, and the imposition of the penalty on persons found on board. It would be a great hardship on those persons if the proceedings against them were delayed until it was adjudged that the ship was forfeited. By the 28th section of that Act, every person is subject to the penalty who is found or discovered to have been on board any ship *liable to forfeiture.* By the 226th section (*b*) of the "Customs Consolidation Act, 1853," all ships seized under any law relating to the Customs "shall be deemed and taken to be condemned, and may be sold," unless the person from whom the ship has been seized, or the owner, shall within one month give notice that he claims it. Since, therefore, it is not necessary that there should be a formal condemnation of the ship by a Court of competent jurisdiction, it cannot be necessary in a proceeding for the penalty to prove before the magistrate that the ship has been condemned.

The Court then called on

Crompton, for the respondent.—Proof of the condemnation of the ship was necessary to give the magistrate jurisdiction. The expression in the 28th section of the "Supplemental Customs Consolidation Act, 1855," "liable to forfeiture," has reference to the time when the person is

(*a*) *Ante*, p. 706. (*b*) *Ante*, p. 707.

found on board the ship, and contemplates forfeiture as a future event. [*Bramwell*, B.—The words are "or discovered to *have been* on board"; the ship may have sailed away, so that it could not then be condemned.] By the 226th section of the "Customs Consolidation Act, 1853," the owner or master has a month within which he may give notice that he claims the ship; and by the 26th section (*a*) of the "Supplemental Customs Consolidation Act, 1855," if the contraband goods were on board without the knowledge or privity of the owner or master, and without any wilful neglect or want of reasonable care on their parts, the Commissioners are bound to deliver up the ship to them. In such case the respondent would not be subject to the penalty, for he would not have been found on board a ship "liable to forfeiture." Great injustice might be done by convicting the respondent in the penalty, when within a month afterwards the innocence of the owner or master might be proved. The reasonable interpretation is that the ship should first be forfeited.

KELLY, C. B.—I am of opinion that the appellant is entitled to the judgment of the Court. The question is very simple, and arises upon the interpretation of the 28th section of the "Supplemental Customs Consolidation Act, 1855." By that section every person found on board any ship liable to forfeiture is subjected to a penalty of 100*l.* The only questions, therefore, are, whether the respondent was found on board the ship, and whether the ship was liable to forfeiture. It has been argued that the ship could not be liable to forfeiture until the expiration of one month, within which time the owner or master might give notice, under the 226th section of the "Customs Consolidation Act, 1853," that he claimed the ship. The magistrate

(*a*) *Ante*, p. 705.

1866.
WEALE
v.
BROWN.

was of opinion that he had no jurisdiction to determine whether the ship was liable to forfeiture or not, and that, in the absence of evidence that the ship had been held liable to forfeiture in some Court of competent jurisdiction, it was his duty to order the respondent to be discharged from custody.

Now I am of opinion that it was the duty of the magistrate to hear the whole case, and to determine whether this ship was a ship liable to forfeiture, and, if so, whether the respondent was found on board. The magistrate having failed to prosecute that inquiry, our judgment is that the matter be remitted to him. If the magistrate were right in holding that there must be an actual forfeiture of the ship, it would be incumbent on the party seeking to enforce the penalty to prove the proceedings with respect to the ship, which might have lasted for months or even years, and thus the very object of the legislature in imposing the penalty might be defeated.

BRAMWELL, B.—I am entirely of the same opinion; and I think that we ought to answer in the negative the question which the magistrate has put to us. In my opinion he was wrong in the view he took of his jurisdiction. I do not say whether he might or might not, on the materials before him, have found the respondent guilty—as to that I express no opinion. But inasmuch as he stopped the case on a point of law involving the construction of an act of parliament, it is our duty to tell him he was wrong, and to remit the matter to him for further hearing and adjudication.

CHANNELL, B.—I am of the same opinion. The magistrate refused to decide the case because he thought that he had no jurisdiction, inasmuch as there was no evidence that the ship had been forfeited. Now in my opinion the

1866.
WEALE v. BROWN.

condemnation of the ship was not a condition precedent to the conviction of the respondent for the offence with which he was charged. That being so, all we have to do is to give judgment that the matter be remitted to the magistrate.

PIGOTT, B.—I concur in opinion. The proceedings under the 28th section of the "Supplemental Customs Consolidation Act, 1855," are of a summary character, and if we were to hold, as the magistrate decided, that before the penalty can be inflicted under that section it is necessary that the ship should be condemned and forfeited, we should be changing the language of that section, which says "every person who shall be found or discovered to have been on board any ship *liable* to forfeiture," not any ship "*already forfeited.*"

Matter remitted to magistrate.

BOUGHEY, APPELLANT, *v.* ROWBOTHAM, RESPONDENT. *Nov.* 14.

Races were held in a field occupied by an individual who let it for that purpose; and any one of the public, on payment of a small sum, was admitted into the field. —*Held*, that these races were "public races" within the 6 Geo. 4, c. 81, s. 11, which enables any person licensed to sell beer by retail to be drunk on the premises to carry on his business in booths, tents, or other places at the time and place of holding any "public races."

CASE stated by justices of the county of Chester, under the 20 & 21 Vict. c. 43, for the opinion of the Court of Exchequer (so far as material) as follows:—

An information was exhibited at the Petty Sessions at Sandbach, in the county of Chester, on the 10th of September, 1866, against the appellant.—For that, on the 25th of July last, at the township of Alsager, in a certain booth and premises at Alsager aforesaid, the appellant unlawfully did sell by retail a certain quantity of beer, to wit,

1866.
BOUGHEY
v.
ROWBOTHAM.

two glasses of porter, to one J. H., to be consumed in and upon the said booth and premises, he, the appellant, not having an excise or retail licence, contrary to the form of the statute, &c.

Upon the hearing of the information, the appellant was duly convicted and adjudged to forfeit and pay the sum of 1*l.*, and also 13*s.* 6*d.* costs to the respondent, &c.

The following are the facts of the case:—On the 26th July, certain races were held at Alsager, in a field occupied by one Manley, and which had been let by him to the race committee for the purpose of the races. Notice of the races had been given by advertisements in the public newspapers and by printed placards. A charge of a small sum was made on all persons entering the field. Many went back and would not pay, but all who were willing to pay went in. The race committee paid for the services of police officers to preserve order. Races had been held in the same field once before only, last year, when no charge was made for admission. Several booths were erected on the ground and were let by auction. The appellant, who is a licensed victualler, hired one for 5*l.* and sold beer therein, which was there consumed. He had no additional licence.

The question for the opinion of the Court is, whether these were "public races" within the meaning of the 6 Geo. 4, c. 81, s. 11, so as to justify the appellant in selling beer there by virtue of his ordinary licence, and to exempt him from a penalty for so doing.

Mellor, for the appellant.—The 6 Geo. 4, c. 81, s. 11, enables any person duly licensed to sell beer by retail to be drunk on his premises to carry on his trade "in booths, tents or other places, at the time and place and within the limits of holding any lawful and accustomed fair, by virtue

of any law or statute in that behalf, or any *public races*." These were "public races" within the meaning of that enactment. The justices seem to have thought that because some persons paid for admission to the field, and others who refused to pay went back, these races were not public races. But the same argument would apply to theatres, and other places of public entertainment, where money is paid for admission. No doubt, if a person had a race in his field, to which only a limited number of persons were invited, that would not be a "public race;" but here any one of the public who chose to pay a small sum was admitted into the field.

No counsel appeared to support the conviction.

KELLY, C. B.—Reading the language of the statute in connection with the facts of the case, there can be no reasonable doubt that these were "public races" within the meaning of the 6 Geo. 4, c. 81, s. 11. The circumstance which seems to have operated on the minds of the justices, viz., that persons were required to pay a small sum for admission to the field, is perfectly immaterial. Many exhibitions and entertainments of a public character are held on the private property of individuals, who might, if they thought fit, have excluded the public altogether. Here any one of the public who paid the sum required might enter the field; and there was nothing whatever to take away from these races the character of "public races." Under these circumstances our judgment will be for the appellant.

BRAMWELL, B., CHANNELL, B., and PIGOTT, B., concurred.

Determination of justices reversed.

1866.

Nov. 26.

NUTTALL *v.* BRACEWELL.

In the year 1804, by memorandum in writing, not under seal, a riparian proprietor agreed to allow the plaintiff, the occupier of a mill erected on land abutting on a natural stream, to make a goit through the land of the former, the latter paying for the privilege the annual sum of 5*s*. The goit was made, and from thence the water of the stream flowed through it to the plaintiff's mill, which it worked, and then returned into the stream at a point below. The defendant abstracted the water above the point where the goit commenced, whereby the flow to the plaintiff's mill was diminished.—*Held* that the plaintiff was not a mere licensee, but acquired under the agreement a right in respect of which he could maintain an action against the defendant for abstracting the water.

THE declaration stated that the plaintiff was possessed of a mill, lands and premises, and also of a goit, or cut, running from a certain stream or watercourse called "Corn Mill Beck," towards, unto and into his said mill, lands and premises, and by reason thereof was entitled to the flow of part of the waters of the said stream or watercourse through and along the said goit or cut to his said mill, &c., for the working and use of his said mill; and that the defendant wrongfully and injuriously drew off and diverted from the said stream or watercourse large quantities of the waters thereof which otherwise would and ought to have flowed from the said stream or watercourse through and along the said goit or cut towards, unto and into the said mill, &c., of the plaintiff: by reason whereof the plaintiff has been unable to work and use his said mill, lands and premises in so large and beneficial a manner as he might and otherwise would have done, &c.

Pleas.—First: not guilty. Secondly: that the plaintiff was not entitled to such flow of water as in the declaration alleged. Thirdly: that the plaintiff was not possessed of the mill, lands and premises, goit or cut in the declaration mentioned.—Issues thereon.

At the trial, before *Keating*, J., at the Leeds Spring Assizes, 1866, the following facts appeared:—The plaintiff occupied, under a lease, a mill called "Coate's Mill." This mill is an ancient mill, erected on land which for some distance abuts on a natural stream called "Corn Mill

Beck." The defendant was a riparian proprietor, and also the owner and occupier of an ancient mill higher up the same stream, and above the plaintiff's mill. The plaintiff's mill was worked by the water of this stream; and prior to the year 1804 such water flowed from the stream through a "goit" or cut leading into a reservoir, and thence to the mill by another goit. These goits and the reservoir are all in the land on which the mill stands. In the year 1804 one Bagshawe, who was the owner of a close called "Tom Milner's Ing," which also abuts on this stream immediately above and adjoining the land on which Coate's Mill stands, entered into the following agreement in writing, not under seal, with one Bracewell, the then owner of "Coate's Mill" and the adjoining land.

"Memorandum of agreement entered upon and made the 14th day of March, A. D. 1804, between W. C. Bagshawe, Esq., on the one part, and W. Bracewell, of Coates, in the county of York, of the other part. The said W. C. Bagshawe doth agree for him and his heirs to allow the said W. Bracewell to make a goit through a certain meadow called "Tom Milner's Ing," beginning at the west end of the same at a place called Hebble Bridge, and to extend to the north side of the said "Tom Milner's Ing," entering the land of W. Bracewell called Sandy Beach: this goit to be fifty yards in length: the land to be made good by the said W. Bracewell. The said W. Bracewell doth further covenant to pay for the said privilege and privileges the annual sum of 5s. of lawful money to W. C. Bagshawe, his heirs, executors and administrators.—As witness, &c.

"Wm. C. Bagshawe.
"Wm. Bracewell."

The goit was accordingly made, and it began at a weir across the stream at Heble Bridge, which was alleged to be the property of the plaintiff. From that time to the

1866.
NUTTALL
v.
BRACEWELL

present a part of the water of the stream flowed through this goit to the plaintiff's mill, which it worked, and then returned into the stream at a point below. The residue of the stream flowed in the old channel. The defendant abstracted the water from the stream above the weir and the point where the goit commenced, whereby the flow of water to the plaintiff's mill was diminished and he was unable to work it.

It was submitted on behalf of the defendant that the action was not maintainable, inasmuch as the plaintiff had a mere licence to use the water which flowed through the goit.

The learned Judge left it to the jury to say: first, was the plaintiff entitled to the flow of water through the goit: secondly, did the defendant divert any of it, so as to interfere with the plaintiff's right. The jury found a verdict for the plaintiff with 250*l.* damages.

Field, in the following Term obtained a rule nisi for a new trial, on the ground that the plaintiff as a mere licensee, and not a riparian proprietor, had no right to the water, or to maintain the action, and that the learned Judge should have so directed the jury; against which

Manisty and *Kemplay* shewed cause (*a*).—Since the case of *Whaley* v. *Laing* (*b*), and the interpretation put upon that case by *Bramwell*, B., in *The Stockport Waterworks Company* v. *Potter* (*c*), it must be conceded that the mere possession or taking of the water by the plaintiff would not enable him to maintain this action. But the plaintiff has a title to the water under a grant from a riparian owner. If the plaintiff were a mere licensee, he

(*a*) May 29. Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.

(*b*) 3 H. & N. 675. 901.

(*c*) 3 H. & C. 300. 318.

might nevertheless maintain this action against the defendant, who is a wrong doer. But the plaintiff has a right to the goit and the water flowing through it from the stream to his mill. Although, as against the grantor, the memorandum prevents the plaintiff from acquiring an absolute right to the water by sixty years enjoyment, yet against the defendant the plaintiff has a sufficient title. The enjoyment for that length of time affords reasonable ground for inferring that the user had been acquired by a grant by deed: *Beeston* v. *Weate* (*a*). It is true that in *The Stockport Waterworks Company* v. *Potter* it was laid down that where a riparian proprietor, by a deed which conveys only land not abutting on a stream, affects to grant water rights, the grant, though valid as against the grantor, can create no rights for an interruption of which the grantee can sue a third party in his own name. But the Court were not unanimous, and it is doubtful whether that doctrine can be supported. The right to the enjoyment of water flowing in a natural stream is a right which, like other rights of property, the owner may grant as appurtenant to land, and for its more convenient use. In *Ackroyd* v. *Smith* (*b*) it was sought to create rights unconnected with the use and enjoyment of the land and to annex them to it, so as to render it subject to a new species of burthen. A riparian proprietor may by usage acquire a right to use the water in a manner not justified by his natural right, but such acquired right cannot be exercised in a manner necessarily injurious to the natural rights of a landowner higher up the stream: *Sampson* v. *Hoddinott* (*c*). The plaintiff is a riparian proprietor, for he is possessed of the goit, which includes a portion of the bank. In *The Stockport Water Works Company* v. *Potter* (*d*) *Bramwell*, B.,

(*a*) 5 E. & B. 986.
(*b*) 10 C. B. 164.
(*c*) 1 C. B. N. S. 590.
(*d*) 3 H. & C. 300, 320.

1866.
NUTTALL v. BRACEWELL.

observed that if the smallest portion of the bank had been granted with the water right the plaintiff might have maintained an action against any person who obstructed his right. This is similar to the case suggested in *The Stockport Water Works Company* v. *Potter* (*a*), where a riparian proprietor makes two streams instead of one, and grants land on the new stream.

Overend, Field and *Rew*, in support of the rule.—The plaintiff is a mere licensee; and the agreement has not conferred on him any water right for the obstruction of which he can sue a third party. The principles laid down in *The Stockport Water Works Company* v. *Potter* govern this case. The plaintiff does not claim a right to the water as a riparian proprietor, but only alleges that he was possessed of a mill and a goit running from a watercourse to his mill, and by reason thereof was entitled to the flow of the waters of the watercourse through the goit to his mill. The agreement does not operate as a grant but is a mere license to take the water on payment of a certain annual sum. Such a license is an easement which can only be granted by deed. This case is not distinguishable from *The Stockport Waterworks Company* v. *Potter*, which it is submitted was correctly decided. This is an attempt to create a right wholly unconnected with the use and enjoyment of land, and the cases of *Ackroyd* v. *Smith* (*b*), *Keppell* v. *Bailey* (*c*) and *Hill* v. *Tupper* (*d*) apply. [*Martin*, B.—This is not a right in gross, but a right to take water for the use of a mill, that is, as appurtenant to land, and in respect of its use and enjoyment.] No right to flowing water can be acquired unless the owner of the land through which it flows has, at least, the right to appropriate

(*a*) 3 H. & C. 327.
(*b*) 10 C. B. 164.
(*c*) 2 M. & K. 517.
(*d*) 2 H. & C. 121.

it: *Mason* v. *Hill* (*a*). A riparian proprietor has a natural right to take water flowing through his land, but he cannot, as against third persons, transfer any water rights independent of the land. In *Miner* v. *Gilmour* (*b*), where the rights of a riparian proprietor to the use of water flowing through his land are explained and defined, no such right as that now claimed is contemplated.—They also referred to *Gale on Easements*, pp. 197, 239, 280 n.

Cur. adv. vult.

The following judgments were now delivered (*c*).

MARTIN, B.—This is an action for the recovery of damages for the abstraction of water from a natural stream called Corn Mill Beck, by the defendant, an upper riparian proprietor, whereby damage was caused to the plaintiff, the occupier of a mill called Coate's Mill. Coate's Mill is an old mill erected upon land which for some distance abuts upon the stream in question; it is worked by water power obtained from the above stream. Prior to the year 1804 the water appears to have been taken from the stream by a goit leading into a reservoir and thence to the mill by another goit; these goits and the reservoir are all in the land on which the mill stands. In the year 1804 a Mr. Bagshawe was the owner of a close called Tom Milner's Ing, which also abuts upon the stream and is immediately above the mill, and on the 14th March in that year, by a memorandum of agreement, not under seal, Mr. Bagshaw agreed for himself and his heirs to allow Wm. Bracewell, who was then the owner of Coate's Mill and the land adjoining it, to make a goit for the conveyance of the water of the stream to the mill through the Ing,

(*a*) 5 B. & Adol. 1.

(*b*) 12 Moo. P. C. 131.

(*c*) On the 26th June the Court gave a formal judgment discharging the rule, but postponed until now the statement of their reasons.

1866.
NUTTALL v. BRACEWELL.

beginning at a certain place and to extend to the boundary entering the land of Mr. Bracewell, to be fifty yards in length, and five shillings a year was to be paid Mr. Bracewell for this and another water privilege. This goit was made and it began at a weir across the stream which is alleged to be the property of the plaintiff, and from that time until the present the water of the stream ran in part down this goit towards Coate's Mill, the residue of the water running in the old channel so that the water of the stream entered the land upon which Coate's Mill stands in two channels. It does not appear that injury was done to anyone by the making or use of the goit. Neither the owner above nor the owner below seems to have sustained the slightest injury or inconvenience. The plaintiff is the occupier of Coate's Mill, and the defendant, who as has already been stated is a riparian proprietor above, abstracted the water of the stream above and to such an extent that the jury assessed the plaintiff's damages at 250*l.* But it was contended that he had no remedy for this damage; that he had no right of property in the goit or in the flow of the water in it, in respect of which he could maintain an action; that he was a mere licensee and had not any property.

The application and use of flowing water to work machinery is as old as the law. Corn mills have existed from time immemorial, and it appears from old legal authorities that fulling and other mills worked by water for the purpose of manufacture are of very ancient date. Until the last century steam as a power was, if known, not much in use, and until it was introduced water power was very generally used, and it is still the cheapest when available. The mill is sometimes situated upon the bank of the natural stream but more usually at some little distance from it, and the water is conveyed to it by a goit or artificial cut leading from the stream, and then, after turning the

wheel of the mill flows away in what is commonly called the tail goit. So also water was and is very frequently conveyed from the natural stream in the same manner for purposes of irrigation; and it is not too much to say that the value of actual or supposed water right of this character throughout England may be estimated by hundreds of thousands, perhaps millions. The law has been supposed to be well settled, and in my opinion is nowhere more clearly stated than by Lord *Kingsdown* in *Miner* v. *Gilmour* (*a*). He says:—"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

According to the law so enunciated, and which no doubt is the law, it would be competent for Mr. Bagshawe or his successor in ownership of Tom Miller's Ing to erect a mill upon it and take the water from the stream to work it, provided he neither penned back the water upon his neighbour above or injuriously affected the volume and flow of the water of the stream to his neighbour below, and the law favours the exercise of such a right; it is at once beneficial

(*a*) 12 Moore P. C. 156.

1866.
NUTTALL
v.
BRACEWELL.

to the owner and to the commonwealth; and if this be so why may not the owners of two adjoining closes agree together for their mutual benefit to take the water through a goit from the close of the one into the close of the other, returning the water to the stream in the close of the latter and thereby doing no injury to anyone? In point of fact, very many goits pass through the land of different landowners between the place where the water is taken from the stream and the mill where it works the machinery. The right to a flow of water in a goit is a well known easement and is an incorporeal hereditament, and although it is not competent for an owner of land to render it subject to a new species of burthen at his fancy or caprice, the burthen of one man's land being subject to the right of another to have a flow of water running through it to work his mill is as old as the law itself, and in my opinion is the subject of property and of grant, and not merely of licence. It is true that being an incorporeal hereditament it cannot be created so as to immediately bind the original grantor except by deed under seal, but assuming that sixty years undisturbed possession originating in the agreement of 1804, does not confer a good title as against Mr. Bagshawe and his heirs, I think the actual possession and enjoyment of the goit by the plaintiff gives a good and valid right of action against the defendant, a wrongdoer.

The case of *The Stockport Water Works Company* v. *Potter* (*a*) was the sole authority relied upon by the defendant's counsel. It was a case where the water of the river Mersey was abstracted for the use of the inhabitants of Stockport for domestic purposes, and the complaint was that the defendants had fouled it. It is therefore different from the present. My brother *Bramwell* differed from the other three Judges of this Court. I do not pretend to say which judgment is right. It suffices to me that it is

(*a*) 3 H. & C. 300.

not directly in point, and I decline to extend it, if indeed it is capable of being so extended, as to hold that the plaintiff has no right of action.

In my opinion he has, and the rule for a new trial ought to be discharged.

BRAMWELL, B.—The late Lord Chief Baron and my brother *Channell* think that this case is not governed by *The Stockport Water Works* v. *Potter*. As the judgment in that case was theirs, I ought to defer to their view of it, and it therefore does not prevent me from saying as I do that I think the plaintiff here is entitled to recover. I abide by the reasons I gave in the other case, which I understand are considered not erroneous but inapplicable to the circumstances of that case. I wish, however, to add to what I then said.

The principle on which it seems to me the plaintiff is entitled to recover is this. As a general rule, when a man has a property, he may grant to others estates in and rights of enjoyment of it, and the grantees may maintain actions against those who disturb them. I do not say there is no exception; there may be for aught I know. A man entitled to land may grant leases, may grant the exclusive herbage, a right of depasturing, a right of way, a right to game. He may grant the mines underneath, or the right to get minerals and other rights in or over the property, or of enjoyment of it. So, if the land is covered with water, he may grant rights of fishing. So the grantees of mines may regrant. So of chattels; the owner may let them to hire. And in all these cases the grantee may maintain actions in respect of the rights granted.

Now what is the case here? Mr. Bagshawe is a riparian proprietor. Subject to the rights of those opposite and those lower down the stream, he may divert the water where it flows by his land; why may he not grant

1866.
NUTTALL v. BRACEWELL.

this right or mode of enjoyment? I say the burthen of proof is on those who say he may not. This right of his, this mode of enjoying his property, is presumably grantable like others. Those who deny this must give a reason for it, and I have heard of none. It seems to me that all reasons of public convenience and all other reasons as much make this right grantable as any other right.

But it may be said, how is *Tupper* v. *Hill* distinguishable? One mode of enjoying land covered with water is to row boats on it, and the owner has an exclusive right. I think it easy to point out the distinction. It was competent for the grantors in that case to grant to the plaintiff a right of rowing boats on the canal; and had any one interfered with that right the grantee might have maintained an action against him. But the plaintiff there did not sue for any such cause of action. He sued, not because his rowing was interfered with, but because the defendant used a boat on the water. Now suppose the grantors there had granted to the plaintiff a right to row boats, and to J. S. a right (as far as the word is sensible) that no one but the plaintiff should row boats on the canal. Clearly J. S. could not have maintained any action. He would not have sued in respect of any estate, or of any easement, or of any mode of enjoyment which was disturbed. Nor did the plaintiff in that case. It makes no difference that the two rights, as far as possible, were in him, viz., a right to row and a right to exclude others. It was in respect of the latter he sued, and it mattered not he possessed the former. But apply this reasoning to the present case. The plaintiff complains that his right is interfered with. His right is not merely that no one shall take *part* of the water, but that he the plaintiff shall take *all*, and this the defendant has prevented.

On these grounds, as well as for the reasons I gave in *The Stockport Water Works* v. *Potter*, I think our judgment must be for the plaintiff.

CHANNELL, B.—The judgment which I am about to deliver is that of the late Lord Chief Baron and myself.

The facts of this case are very fully stated in my brother *Martin's* judgment. The main question argued at the bar, indeed the only question argued on the part of the defendant, was, whether or not this case was distinguishable from, or governed by the case of *The Stockport Water Works Company* v. *Potter*. But the plaintiff contended that that decision, if applicable to the present case, was wrong.

That case was argued before Lord Chief Baron *Pollock*, my brother *Bramwell*, my brother *Wilde* (then a member of this Court) and myself. The judgment of the Court was not unanimous. My brother *Bramwell* strongly dissented from the judgment delivered by the Lord Chief Baron *Pollock* as his judgment, and which (as stated by Lord Chief Baron *Pollock*), had the sanction of my brother *Wilde*, though, being no longer a member of this Court he took no part in it.

As that, though not an unanimous judgment, was a judgment of the majority of the members of this Court who heard the argument, I should, even if I had altered my opinion, feel myself bound by the decision as governing the present case unless this is distinguishable. But the present case seems to me to be distinguishable. I quite agree that the passage quoted by my brother *Martin* from Lord *Kingsdown's* judgment in *Miner* v. *Gilmour*, very clearly as well as accurately states the law applicable to running streams. I think however that the decision in the *Stockport Water Works Company* v. *Potter* was quite in accordance with the law as so stated. And further if the decision on the Stockport Water Works case was wrong, then it appears to me that Lord *Kingdown's* statement would require qualification. The Stockport Water Works case in effect decided that a riparian proprietor cannot

1866.
NUTTALL v. BRACEWELL.

grant away his water rights apart from his estate, so as to place the grantee in the same position with respect to the other riparian proprietors as he occupied himself. Now if that is wrong, then a riparian proprietor is not entitled to use the stream for extraordinary purposes provided he merely abstains from interfering with other proprietors, as Lord *Kingsdown* says, but provided he also abstains from interfering with *the grantees* of other proprietors.

I am not aware of any such additional restriction on the right of a riparian proprietor. It would go well nigh to destroy his rights altogether, for that can scarcely be called a right which is subject to an indefinite restriction unascertained and practically unascertainable. I consider that the rights of a riparian proprietor with respect to the stream are limited only by those of persons in a similar or analagous position with respect to the stream as himself. These rights he can easily ascertain, and by this means ascertain his own. But he has no means of ascertaining who may be grantees or what may be the nature of their grant. If therefore a riparian proprietor grants to some one not such a proprietor a right to abstract water from the stream, as in the Stockport Water Works case, I think the grantee can sue only the grantor for any interference with him. If, however, two adjoining riparian proprietors agree to divert the stream so that it shall run in two channels instead of one, the water passing again into the old stream below their land, and flowing down to the lower proprietors as before, the case is I think different. What is done is apparent to all and any use that may be made of the new stream, as to turn a mill, for instance, is as apparent as if the mill were upon the old stream. What is done by the two proprietors may be supposed to be a more convenient way of making use of the flow of water, while it in no way diminishes or affects the rights of other proprietors.

This distinction is alluded to in the judgment of the majority in the *Stockport Water Works Company* v. *Potter* (*a*), where it is said, "The case where a riparian proprietor makes two streams instead of one and grants land on the new stream, seems to us analogous to a grant of a portion of the river bank, but not analogous to a grant of a portion of the riparian estate not abutting on the river. In the case of a grant of land on a new stream the grantor obtains a right of access to the river, and it is by virtue of that right of access that he obtains his water right." Now in the present case Coate's Mill is on an estate abutting on the river. Prior to 1804 the water came to the mill from the stream through a goit and a reservoir all on the mill owner's estate. Since then there has been either an additional supply of water or a substituted one, I am not sure which, through a goit leaving the river higher up on the estate of another proprietor. Now it seems to me that the goit is to all intents and purposes a new stream, and any person having land upon it would have the rights of a riparian proprietor, viz., to use the water in any way not interfering with others. I see no reason why the law applicable to ordinary running streams should not be applicable to such a stream as this, for it is a natural stream or flow of water though flowing on an artificial channel. It may be that the case of an entirely artificial stream, as one flowing from a mine for instance, would be different, but that an artificial stream may be on the same footing as a natural one as regards the rights of riparian proprietors is held in *Sutcliffe* v. *Booth* (*b*).

I think therefore that in the present case the plaintiff has a right of action, and the rule for a new trial ought to be discharged.

Rule discharged.

(*a*) 3 H. & C. 327. (*b*) 32 L. J. Q. B. 136.

1866.

NUTTALL v. BRACEWELL.

MEMORANDA.

On the last day of this Term the Right Honorable Sir *William Erle* resigned his office of Chief Justice of the Court of Common Pleas. He was succeeded by Sir *William Bovill*, Her Majesty's Solicitor General, who was previously called to the decree of the coif, and gave rings with the motto, "*Leges sine Moribus vanæ.*"

In this Michaelmas Vacation *John Burgess Karslake*, Esq., one of Her Majesty's Counsel, was appointed Solicitor General in the room Sir *William Bovill*, and afterwards received the honour of Knighthood.

The Right Honorable Sir *Richard Torin Kindersley* resigned his office of Vice Chancellor. He was succeeded by *Richard Malins*, Esq., one of Her Majesty's Counsel, who afterwards received the honour of Knighthood.

The following gentlemen were appointed Her Majesty's Counsel:—*Thomas Spinks*, of the Inner Temple, Doctor of Civil Law; *Joseph Trigge Schomberg*, of the Inner Temple, Esq.; *Harris Prendergast*, of Lincoln's Inn, Esq.; *George Morley Dowdeswell*, of the Inner Temple, Esq.; *Charles Greville Prideaux*, of Lincoln's Inn and the Middle Temple, Esq.; *Benjamin Hardy*, of Gray's Inn, Esq.; *George Little*, of the Middle Temple, Esq.; *Henry Thomas Cole*, of the Middle Temple, Esq.; *John Pearson*, of Lincoln's Inn, Esq.; *Francis Roxburgh*, of the Middle Temple and Lincoln's Inn, Esq.; *Thomas James Clark*, of the Inner Temple, Esq.; *Henry Cotton*, of Lincoln's Inn, Esq.; *Edward Kent Karslake*, of Lincoln's Inn, Esq.; *George Druce*, of Lincoln's Inn, Esq.; *Edward Ebenezer Kay*, of Lincoln's Inn, Esq.; *Thomas Kingdon Kingdon*, of the Inner Temple, Esq.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

BANKRUPTCY.

See EXECUTION.
PLEADING, (1), I.

(1). *When Cause of Action vests in Official Assignee.*

To a declaration alleging that the plaintiff was induced, by the false and fraudulent representations of the defendant, to make large payments on account of a certain manufacture, and "by reason of the said false and fraudulent representation the plaintiff sustained great loss and was adjudicated bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit," the defendant pleaded, except as to the claim in respect of the plaintiff being adjudicated bankrupt and the personal annoyance, trouble, inconvenience and injury to his character and credit, that the loss was a pecuniary loss, and that the cause of action pleaded to vested in the plaintiff's official assignee.—*Held*, a good plea, inasmuch as the only damage recoverable was in respect of the pecuniary loss. *Hodgson* v. *Sidney*, 492

(2). *Composition Deed under Bankruptcy Act*, 1861.

Deed containing Provision that, as soon as Trustees certified that requisite majority of Creditors have assented to Deed, Creditor is to pay Composition.

I. A composition deed under the Bankruptcy Act, 1861, which provides that, as soon as the trustees shall certify in writing that the requisite majority in number and value of creditors have assented to the deed, the debtor shall pay the composition, is unreasonable and void as against non-assenting creditors. *Boulnois and Another* v. *Mann*, 9

Composition Deed, containing Clause empowering a Trustee in his Discretion to pay in one sum, at such time as he should think fit any Creditor whose Composition did not exceed 10*l.*

II. A deed, under the Bankruptcy Act, 1861, by which the statutory majority of creditors agreed to accept a composition of 10*s.* in the pound, payable by instalments at the end of two, four and six months, contained a clause empowering a trustee, in his discretion, to pay in one sum, and at such time or times as he should think fit, any creditor whose composition did not exceed 10*l.*—*Held*, that this provision created an inequality in the rights of the creditors, and consequently the deed was void. *Thompson and Another* v. *Knight*, 629

Composition Deed, containing Release on Consideration of Covenant by Debtor to pay Composition.

III. A composition deed under the Bankruptcy Act, 1861, made between the debtor of the one part, and all his creditors of the other part, after reciting that the debtor had agreed to pay his said creditors a composition by instalments in satisfaction and discharge of their debts contained a covenant by the debtor with the several creditors, and with each of them respectively, to pay the composition, in consideration of which the creditors released the debtor from all actions, debts, contracts, &c.—*Held*, that the deed was valid and pleadable in bar to an action by a non-assenting creditor. *Gresty* v. *Gibson*, 28

Composition Deed, containing Release in Consideration of Promissory Notes for Payment of Composition — Inequality — Plea, in Bar of Further Maintenance of Action—Release of Debt, Damages and Costs.

IV. To a declaration in an action commenced on the 24th April, 1866, the defendant pleaded that, on the 7th May, 1866, a deed was made under the Bankruptcy Act, 1861, between the defendant of the first part, a surety of the second part, and the several persons creditors of the defendant (not only those whose names and seals were thereunto subscribed and set, but *also all other the creditors of the defendant*) of the third part: whereby, after reciting that the defendant was indebted to the *said several creditors in the several sums of money set opposite to their respective names in the schedule thereunto*, and that it had been agreed, by the statutory majority of creditors, to accept the composition and security therein expressed in satisfaction *of such respective debts*: in consideration of the promissory notes of the defendant and the surety for payment *to the said respective creditors* of the composition of 5*s.* in the pound *on the respective sums of money aforesaid*, the creditors of the defendant, *parties thereto of the third part*, released the defendant, and accepted the composition in satisfaction of the debts owing to them by the defendant *specified in the schedule.* And the defendant and his surety covenanted with *each and every of the creditors parties thereto of the third part* to pay to them the composition and deliver the promissory notes.

Held.—First: That the release was absolute, and that it was not necessary to aver or prove a tender of the composition or promissory notes.

Secondly: That the deed was not bad on the ground of inequality in the rights of the creditors; for according to the true construction of the deed, not only the creditors named in the schedule, but the whole body of creditors were entitled to the benefit of it.

Thirdly: that the plea ought to have been pleaded in bar of the further maintenance of the action, and that in such form it would operate, by virtue of the release, as a bar, not only to the debt, but also to damages and costs. So held in the Exchequer Chamber, affirming the judgment of the Court of Exchequer. *Tetley and Others* v. *Wandless*, 613

Composition Deed, containing no Provision making it Obligatory on Trustee to tender Promissory Notes, or give Notice of Deed to Non-assenting Creditors.

V. A composition deed under the 192nd section of the Bankruptcy Act, 1861, made between the debtor of the first part, a trustee of the second part, and the creditors named in the schedule of the third part: after reciting that the debtor proposed to pay all his creditors a composition by giving them promissory notes; and that such promissory notes had been deposited with the trustee to deliver to the non-executing and non-assenting creditors, witnessed, that, in consideration of the premises each of the creditors who executed, or assented to, or were bound by, the deed, released the debtor.—*Held*, that the deed was not bad on the ground of inequality among the creditors, by reason of its containing no provision making it obligatory on the trustee to tender the promissory notes, or give notice of the deed to

(5). *Registration of Deed under 194th Section of Bankruptcy Act 1861.*

A deed registered under the 194th section of the Bankruptcy Act 1861, in order to operate under the 192nd section must be registered with all the formalities required by the 192nd section. *Pearson v. Pearson.* 315

(6). *Composition Deed not Admissible in Evidence without Registration under the 194th Section of the Bankruptcy Act 1861, although it might not be a valid Deed under the 192nd Section.*

A debtor, by deed, assigned all his estate and effects to trustees to pay rateably and in proportion his creditors who should execute the deed within twenty-one days from the date thereof, the several debts or sums set opposite their names in the schedule: provided that such creditors as did not assent in writing within such further time as the trustees should declare should be excluded from all benefit under the deed.—*Held*, that as the deed, on the face of it, professed to be a deed of arrangement between the debtor and the whole body of his creditors, it was not admissible in evidence without registration under the 194th section of the Bankruptcy Act, 1861, although it might not be a valid deed under the 192nd section. *Prichard v. Timothy and Roberts,* 393

(7). *Set-off of Rent due from Debtor after Execution of Composition Deed but before its Registration.*

In an action by trustees of a deed made by a debtor under the Bankruptcy Act, 1861, the defendant may set off a debt for rent payable to him by the debtor under a demise, and which became due after the execution of the deed but before its registration. *Stanger and Another v. Kiser.* 1

(8). *Execution by Judgment Debtor of Composition Deed under 192nd Section of Bankruptcy Act, 1861, after Levy under Fi. Fa., but before Sale.*

A debtor, whose goods had been taken in execution under a writ of fi. fa., before their sale, executed a composition deed under the 192nd section of the Bankruptcy Act, 1861, which was duly registered.—*Held*, that by the 194th section the execution was no longer available, and the Court ordered the sheriff to withdraw from possession. *Rogers v. Roberts.* 600

(9). *Execution delayed by Interpleader Order and Bankruptcy of Debtor before its completion by Sale.*

Where an execution is levied by seizure of the goods of the debtor, and afterwards an interpleader order is made by which the execution is delayed, and before its completion by sale of the goods the debtor is adjudged a bankrupt, the execution creditor is, by the 184th section of the Bankrupt Law Consolidation Act, 1849, entitled to no more than a rateable part of his debt. *O'Brien v. Brodie,* 544

(10). *Liability of Inspectors under Deed of Inspectorship for Goods Supplied.*

A debtor and his creditors entered into a deed of inspectorship, under the Bankruptcy Act, 1861. Before the deed was executed by the debtor he had ordered of the plaintiff certain goods, and after the plaintiff had informed the debtor that they

were ready for delivery the inspectors, by an order to which they signed their names "*for*" the debtor, requested the plaintiff to send the goods.—*Held*, that the inspectors were not personally liable for payment of the goods. *Redpath* v. *Wigg and O'Beirne*, 432

(11). *Examination of Prisoner in Gaol by Registrar of Court of Bankruptcy, under* 101*st section of Bankruptcy Act*, 1861.

The examination of a prisoner in gaol by a registrar of the Court of Bankruptcy under the 101st section of the Bankruptcy Act, 1861, is a judicial proceeding in a public Court; and no action will lie for the publication of defamatory matter contained in a fair and bonâ fide report of such proceedings. *Ryalls* v. *Leader and Others*, 555

BEER.

See RACE, (2).

BENEFIT BUILDING SOCIETY.

Dispute between the Board and a Member of the Society respecting the Construction of a Rule.

A rule of a benefit building Society, enrolled under the 6 & 7 Wm. 4, c. 32, provided "that any member who should be desirous of withdrawing from the Society any share or shares should be allowed to do so on giving two months' notice in writing of such his or her intention to the secretary, subject to the payment of all fines then due, and to a certain deduction as a proportionate share of expenses incurred. Provided always, that the deduction should not extend to widows and children of deceased members, who should always have a priority in cases of withdrawal." Another rule provided "that the board of management for the time being should determine all disputes which might arise respecting the construction of the rules, or of any of the clauses, matters or things therein contained; and also of any additions, alterations, or amendments which should or might thereafter arise between the board and any member of the Society; and in the event of their decision being unsatisfactory, then to be referred to arbitration." The plaintiff, a member of the Society, gave notice of his intention to withdraw, and claimed the amount of his shares. The board refused to pay it, on the ground that previously to the plaintiff's notice other members had given notice of withdrawal, and were therefore entitled to priority of payment, and that the Society had no funds to pay the plaintiff's claim. The plaintiff thereupon brought the present action.—*Held*, that the plaintiff's claim was a dispute between the board, and a member of the Society respecting the construction of a rule, and therefore the action was not maintainable, but the dispute must be determined by the board or arbitrators. *Wright* v. *Deley and Others*, 209

BILL OF EXCHANGE.

Plea, that Bill was paid by Third Party, and that Plaintiff was suing without his Authority—Partial Failure of Consideration—Set-off against Trustee of Debt due to Defendant from Cestui que trust.

To an action by indorsees against acceptor of a bill of exchange for 3000*l.* the defendant pleaded—

Thirdly: that whilst the plaintiffs were holders, B. paid them the full amount of the bill, and then became entitled to become the holder; yet the plaintiffs did not deliver up the bill to him, but were suing without the authority of B. or any other person. Fourthly, on equitable grounds; that the bill was accepted for the price of certain goods, and on the faith of their being shipped for the defendant by the drawer: that the drawer shipped certain of the goods a portion only of which the defendant received and accepted, amounting in price to 1200*l.*: that by reason of the non-completion of the shipment the goods actually shipped became useless, and except as aforesaid, there never was any value or consideration for the acceptance or payment of the bill: that the drawer paid the full amount of the bill to the plaintiffs; and that the drawer was indebted to the defendant in the sum of 1200*l.*, which he was willing to set-off against the plaintiffs' claim.

Held.—First: that the third plea was bad, inasmuch as it was consistent with the facts stated in it that the plaintiffs were the lawful holders of the bill and entitled to sue upon it.

Secondly: that the fourth plea was good, since it shewed a failure of consideration except as to 1200*l.*; and as the plaintiffs had been paid the full amount of the bill by the drawer, and sued as trustees for him, the defendant was entitled to set off the debt due to him from their cestui que trust. *The Agra and Masterterman's Bank (Limited)* v. *Leighton*, 656.

BILL OF LADING.

See FREIGHT.

BILL OF SALE.

Affidavit of Grantor's Residence and Occupation "to the best of Deponent's Belief."

In the affidavit filed with a bill of sale the deponent swore to the description of the grantor's residence and occupation "to the best of his belief:"—*Held*, that the use of these words did not affect the description, which was sufficient within the 17 & 18 Vict. c. 36, s. 1, if its truth in fact was not impeached. *Roe* v. *Bradshaw*, 178

BOND.

See DEED.

BYE-LAW.

See LOCAL BOARD OF HEALTH.

COLLIERY.

See RESERVOIR.

COMMON LAW PROCEDURE ACT, 1852.

See PRACTICE, (2).

COMMON LAW PROCEDURE ACT, 1854.

See INJUNCTION.
INTERROGATORIES, (1), (2), (3).
PLEADING, (1), (2).

COMMON LAW PROCEDURE ACT, 1860.

See INTERPLEADER.

[illegible]

[illegible]

[illegible]

DEVISE.

that Act, to appoint by will attested by *three* witnesses, is well executed by a will attested by *two* witnesses in conformity with the 9th section of that Act. *Hubbard* v. *Lees*, 418

ELECTRIC TELEGRAPH COMPANY.

See INSURANCE, (2).

EQUITABLE DEFENCE.

See BILL OF EXCHANGE.
PLEADING, (1), I., II.

Void Marriage by reason of Impotence of Husband.

To an action on a covenant, in consideration of marriage, to pay an annuity during the life of the husband, the defendant pleaded, as a defence on equitable grounds, that the marriage was null and void by reason of the impotence of the husband.—*Held*, a bad plea. *Edward Cavell and Another* v. *Prince*, 368

EVIDENCE.

See BANKRUPTCY, (6).
NEGLIGENCE, (3), I., II.
PROSTITUTE.

(1). *Entries in New Testament.—Correspondence between Members of same Family.*

In questions of pedigree, entries of births, deaths and marriages of members of the family in a New Testament, produced from the proper custody, are evidence without proof of the handwriting.

So, also, correspondence between members of the same family, in which they respectively address one another as relatives. *Hubbard* v. *Lees*, 418

(2). *Of Negligence on the part of Railway Company.*

I. The defendants' railway crossed on a level a public footway; and on each side of the line were swing-gates through which passengers entered. At one of these gates the view up and down the line was obstructed by the piers of a railway bridge which crossed it, but near the line there was a clear view of 300 yards in each direction. A woman who approached the line by that gate waited until a luggage train had passed, and immediately afterwards proceeded to cross the line, when a person on the other side twice called out to her, but, being deaf, she did not hear, when an express train, which the luggage train had prevented her from seeing, knocked her down and killed her. Thirty-six passenger trains passed along the line daily, besides luggage trains. No person was stationed at the crossing to warn passengers of danger, but caution boards were placed there.—*Held*, that there was no evidence for the jury of negligence on the part of the defendants. *Stubley, Administrator of Mary Stubley, deceased*, v. *The London and North Western Railway Company*, 83

II. The defendants' railway intersected a public foot and carriage way upon the level close to a station on the defendants' line. At the place of intersection swing carriage gates opened both ways, and there was also a swivel gate on each side of the line for persons on foot. The plaintiff, a return-ticket holder, while crossing the line at this place to reach the passenger station, was killed by an overdue express. At the time of the accident one of the swing-gates was partially open and

to the plaintiffs in the sum of 170*l.*, being the aggregate of several monthly accounts for coal supplied. The plaintiffs having refused to supply any more coal unless the accounts were settled, the defendant paid them 9*l.*, and gave them a bill of exchange for 61*l.*, and the following guarantee, signed by his father:—"In consideration of the credit given by the H. G. Coal Company (the plaintiffs) to my son, J. P., for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*; and in default of his payment of any account due I bind myself by this note to pay to the H. G. Company whatever may be owing, to the amount not exceeding the sum of 100*l.*"—*Held*, that this was a continuing guarantee, and applied to *future* as well as the accounts then due. *Wood and Another* v. *Priestner*, 681

HUSBAND AND WIFE.

See EQUITABLE DEFENCE.

INFORMATION.

See REGULÆ GENERALES.

INJUNCTION.

See PLEADING, (2).

After Recovery of Damages against Railway Company in respect of Inequality of Charge for Parcels.

The plaintiff whose trade was to pack parcels and forward them by railway in a single package, having, under protest, paid to the defendants a sum in excess of what they charged certain wholesale houses for carrying parcels containing enclosures of their customers, sued to recover the excess, and at the trial adduced evidence (which was excepted to), upon which the Judge told the jury they were at liberty to find "that parcels had been carried by the defendants for other persons," viz., the wholesale houses, "containing goods of a like description, and under like circumstances, at a less rate than such goods were carried by them for the plaintiff, and that the defendants knowingly and purposely charged the plaintiff more than other persons." The plaintiff obtained a verdict and judgment, and in the Exchequer Chamber the exceptions were overruled, and judgment affirmed. The defendants continuing the same charges, the plaintiff issued a fresh writ of summons indorsed with a claim for an injunction, and applied under the 17 & 18 Vict. c. 125, ss. 79 and 82, upon affidavits stating facts substantially similar to the evidence adduced on the trial, for an injunction to restrain the defendants from charging him "for the carriage of his goods otherwise than equally with all other persons, and after the same rate, in respect of goods of the like description under the like circumstances." —*Held:* that this was not a case in which the Court would enjoin under that Act. *Sutton* v. *The South Eastern Railway Company*, 325

INLAND REVENUE.

See CUSTOMS.

INSPECTORS.

See BANKRUPTCY, (10).

INSURANCE.

(1.) *When Risk attaches where Vessel Insured "at or from" a Foreign Port.*

Where a vessel is insured "at

or from" a foreign port at which she is expected to arrive, the risk attaches when she first arrives at that port in such a seaworthy condition as to be enabled to lie there in safety. *Houghton and Others* v. *The Empire Marine Insurance Company, Limited*, 44

(2.) *Risk and Contingency of Laying Down Electric Telegraph Cable.*

An electric telegraph Company, being about to lay down an electric cable between Ireland and Newfoundland, a shareholder in the Company effected an insurance in the common form of a marine policy of insurance, with the following words in the margin of the policy: "and to continue until the said cable be laid in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland, and vice versâ; the risk of this policy then to cease and determine; this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable from and including its lading on board the 'Great Eastern' until 100 words be transmitted from Ireland to Newfoundland, and vice versâ; and it is hereby distinctly declared and agreed that the transmission of the said 100 words shall be an essential condition of the policy." The ship sailed from Ireland with cable on board of the length of 2200 miles, and after about 1200 miles of it had been laid down, in consequence of the electric current not acting, some of it was drawn back into the ship, and whilst this was being done a part of the cable which was on board broke, and the broken end fell into the sea. Some fruitless endeavour was made to raise it, but ultimately the ship returned with the remainder of the cable, about 1200 miles in length, on board.—*Held:* First, that the insurance was not on the cable, but on the risk and contingency of successfully laying it down. Secondly, that the plaintiff was entitled to recover for a total loss. *Wilson* v. *Jones*, 221

(3). *Deduction of one-third new for old in respect of Repairs.*

A marine policy of insurance contained the following clause:—"The usual deduction of one-third of the amount of repairs will not be made by this Company in the case of ships built within the limits of the United Kingdom until after eighteen months, or in the case of Colonial built ships until after twelve months from the date of the builder's certificate; but after such dates respectively the deduction will be made." By custom, underwriters make a deduction of one-third, new for old, only in respect of repairs made *after the first voyage of a vessel.*—*Held*, that the expression "usual deduction" had reference to the quantum only, and that in the case of a Colonial built ship the underwriters were entitled to make the deduction of one-third, after twelve months from the date of the builder's certificate, although the ship had not completed her first voyage. *Byrne* v. *The Mercantile Insurance Company, Limited*, 506

(4). *Policy underwritten by Brokers for greater Amount than authorized by his Principal.*

A broker at Liverpool was authorized by his principal in London to underwrite in the name of the latter policies of marine insurance, not exceeding 100*l.* on any one vessel.

The broker underwrote a policy for 150*l*. It is well known in Liverpool that the amount for which a broker can underwrite the name of his principal is limited, but the limit is not disclosed. In an action on the policy:—*Held*, that the broker having exceeded his authority, and the contract being indivisible, the policy was void. *Baines and Another* v. *Ewing*, 511

INTERPLEADER.

See BANKRUPTCY, (9).

Order under 12th Section of Common Law Procedure Act, 1860.

B. assigned to T., by way of mortgage, certain policies of assurance. T. delivered the policies to the defendants, to collect the money due thereon. The defendants failed to do so, and T. sued them for the policies, declaring on the special contract, with counts in trover and detinue. Afterwards B. sued the defendants for the polices, and upon an interpleader summons *Bramwell*, B., ordered that the action by T. be stayed until further order; that T. be at liberty to defend the action by B., giving the defendants an indemnity, and that B. give them security for costs.—*Held*: that the order was just and reasonable, and that the Judge had power to make it under the 12th section of the Common Law Procedure Act, 1860. *Tanner* v. *The European Bank*. *Bowen* v. *Same*, 398

INTERROGATORIES.

(1). *In Trover.*

In an action of trover the defendant will not be allowed to interrogate the plaintiff as to the nature of the title by which he claims the goods. *Finney* v. *Forward and Another*, 33

(2). *For the purpose of shewing that the Plaintiff has sustained no damage by Defendant's Breach of Agreement.*

In an action for the breach of an agreement to pay the stamp duty on letters patent, whereby they became void, and the plaintiff lost the profits thereof, the Court refused to allow the defendant to administer interrogatories to the plaintiff for the purpose of shewing that the letters patent were of no value. *Jourdain* v. *Palmer*, 171

(3). *Answers tending to criminate Parties interrogated.*

It is no objection to the delivery of interrogatories under the 51st section of the Common Law Procedure Act, 1854, that the answers would criminate the party interrogated, but he may on that ground refuse to answer them.

Where, however, it appears that interrogatories are not put bonâ fide, but with some sinister object, the Court will, in the exercise of its discretion, disallow them.

In an action charging the defendants, as a partnership firm of attornies, with negligence in investing the plaintiff's money, one of the defendants, who was not an attorney, objected to the delivery of interrogatories to him for the purpose of ascertaining whether he was a partner in the firm, inasmuch as the answers might render him criminally liable under the 6 & 7 Vict. c. 73, s. 2.—*Held*, that the interrogatories ought to be administered, and that the defendant might safely answer them,

which, though not in a strictly legal, might in a popular sense be called a hospital, might claim exemption.

Commissioners appointed by the Crown to administer funds subscribed by the public for the relief of the widows and orphans of soldiers, sailors and marines, who died in battle, purchased land charged with land tax, and built upon it and endowed an asylum for the support, maintenance and education of 300 daughters of such soldiers, sailors and marines.—*Held*, that the land having been charged with land tax, would still be chargeable in the hands of the Crown, even if directly purchased for the Crown.

But, *semble*, that even if this asylum had been in existence at the time the 38 Geo. 3, c. 5, passed, it would not have been exempt as Crown land.

Semble also, that the asylum was not a "hospital" in the popular sense, which is rather an institution for the relief of the sick or aged than for the maintenance and education of children. *Lord Colchester and Others* v. *Kewney*, 445

LESSOR AND LESSEE.

Terms of Tenancy where Lessor remains in Possession after Expiration of Lease.

Where a lessee, after the expiration of his lease, remains in possession and pays rent it is a question for the jury upon what terms his tenancy continues.

A tenant for life granted a lease containing a covenant that he would, at the expiration of the term, pay and allow the lessee, a nurseryman, for all fruit trees and shrubs then on the premises, which had been planted by him. At the expiration of the lease, the lessee continued in possession and paid rent, and upon the death of the tenant for life he paid the same rent to the remainderman, who was not aware of the covenant in the lease.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court below), that there was no evidence for the jury that the tenancy continued upon the terms of the lease so as to bind the remainderman by the covenant. *Oakley* v. *Monck*, 251

LEVANT AND COUCHANT.

Meaning of Expression.

Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that in a claim of common of pasture for cattle levant and couchant upon land appurtenant thereto, the expression "levant and couchant" means such a number of cattle as the land might maintain by its produce beyond the amount of food obtained by them from the common, and that it is not necessary that they should be actually fed, either wholly or in part, from the produce of the land. *Carr* v. *Lambert, Woodhall and Others*, 257

LIBEL.

See BANKRUPTCY, (11).

LOCAL BOARD OF HEALTH.

Bye-law, that before beginning to lay Foundation of new Building one month's notice shall be left with the Clerk of the Board, accompanied with Sections and Plans.

A Local Board of Health has no power, under the 34th section of

"The Local Government Act, 1858," to make a bye-law, that before beginning to dig or lay the foundation of any new building a written notice thereof of one month at the least shall be left with the clerk at one of the monthly meetings of the Board, accompanied with plans and sections; and whosoever shall neglect or refuse to give such notice shall be liable to a penalty not exceeding 5*l*.

If a person gives a Local Board notice of his intention to build, and leaves with them plans and sections, he may at once commence the building, subject to the right of its being altered or pulled down if not in conformity with the bye-laws of the Board. *Hattersley and Others* v. *Burr*, 523

LOCAL GOVERNMENT ACT, 1858.

(21 & 22 VICT. c. 98.)

See LOCAL BOARD OF HEALTH.

MARINE INSURANCE.

See INSURANCE.

MASTER AND SERVANT.

See APPRENTICE.

MEMORANDA, 119, 607, 728.

MINE.

See RESERVOIR.

NEGLIGENCE.

See EVIDENCE, (2), I., II. INTERROGATORIES.

(1). *Exposure of dangerous Machine in Market Place, without the Handle being fastened, or its being thrown out of Gear, or in the care of any Person.*

The defendant exposed in a market place a machine for crushing oil cake, without the handle being fastened, or its being thrown out of gear, or in the care of any person. The plaintiff, a boy four years old, on returning from school under the care of his brother who was seven years old, stopped with other boys at the machine, and whilst one of them was turning the handle put his fingers in the cogs of the wheels, on being told by his brother to do so, and three of his fingers were crushed.—*Held*, that the defendant was not liable, as there was no negligence on his part; and the injury was caused by the act of the plaintiff and the boy who turned the handle. *Morgan, an infant, by John Morgan, his next friend,* v. *Atterton*, 688

(2). *Injury to a Servant of a Railway Company through the negligence of a Servant of another Company in shunting a Train on a Station used in common by both Companies.*

The plaintiff, a servant in the employ of the London and North Western Railway Company, was at work at a station in Manchester, when an engine driver in the employ of the defendants, the Great Western Railway Company, shunted a train belonging to the defendants from one part of the station to another so negligently that the plaintiff was thereby injured. The station was the property of the London and North Western Railway Company, and was used in common by that Company and the defendants and

other Companies. By arrangement between all these Companies the defendants' engine driver ought to have awaited a signal from an officer of the London and North Western Railway Company before he shunted the train.—*Held*, that the plaintiff and the engine driver were not fellow servants within the rule of law that a master is not in general responsible to his servant for injury occasioned by the negligence of a fellow servant in the course of their common employment. *Warburton* v. *The Great Western Railway Company*, 695

(3). *Primâ facie Evidence for Jury.*

I. The plaintiff, while making an inquiry at the door of a house in which the defendant had offices, received a push from the defendant's servant, who was watching a packing case propped against the wall of the house, and belonged to the defendant, and the packing case then fell upon and injured the plaintiff. There was no proof why the packing case fell, or who placed it against the wall.—*Held*, that the fall of the packing case was primâ facie evidence of its being set up improperly, and that there was evidence for the jury of the defendant's negligence: Per *Bramwell*, B., and *Pigott*, B. Dissentiente *Martin*, B. *Briggs* v. *Oliver*, 403

II. The plaintiff, a boy twelve years of age, had entered a third class railway carriage at night time, and was about to seat himself when he placed his fingers on a part of the door. His father was behind him getting into the carriage when a porter violently closed the door, which crushed the plaintiff's fingers and struck his father on the back.—*Held*, that there was evidence of negligence on the part of the porter, which was properly submitted to the jury, and that there was no contributory negligence on the part of the plaintiff: Per *Martin*, B., *Channell*, B., and *Pigott*, B. Dissentiente *Kelly*, C. B. *Coleman* v. *The South Eastern Railway Company*, 699

NUISANCE.

Entry upon Land to abate Nuisance caused by Watercourse.

A person in abating a nuisance to his property, may justify an interference with the property of the wrongdoer, but only so far as is necessary to abate the nuisance.

It is the duty of a person who enters upon the land of another to abate a nuisance to do it in the way least injurious to the owner of the land entered.

Where there is an alternative way of abating a nuisance, which involves an interference with the property of an innocent person, or a wrongdoer, the interference must be with the property of the wrongdoer.

The plaintiffs, by parol license from L. and the defendant, constructed a watercourse, through which the water flowed from their colliery across the land of L. and of the defendant into a canal. The defendant revoked his license and entered upon the land of L. and obstructed the watercourse, whereby the plaintiffs' mines were flooded. If the obstruction had been made lower down on the defendant's land, there would have been less damage altogether, and none to the plaintiffs but some damage to L. The damage to L. might have been obviated at trifling expense by mechanical arrangements, but L.'s assent to such arrangements was never asked.—

Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the watercourse was obstructed in a reasonable way, since the other mode would have caused damage to an innocent third party. *Roberts and Another* v. *Rose*, 103

PARISH OFFICER.

Penalty under 55 Geo. 3, c. 137, s. 6 on Parish Officer supplying for his own profit Goods for use of Workhouse, and Penalty under 4 & 5 Wm. 4, c. 76, s. 77, for supplying Goods to an individual Pauper.

The 6th section of the 55 Geo. 3, c. 137 (which imposes a penalty of 100*l.* on any parish officer who shall supply, for his own profit, any goods, materials, or provisions for the use of any workhouse, or otherwise for the support and maintenance of the poor), is not repealed by the 77th section of the 4 & 5 Wm. 4, c. 76, which subjects to a penalty of 5*l.* any parish officer who shall supply for his own profit any goods, materials or provisions to an individual pauper. *Robinson* v. *Emerson*, 352

PARTNERSHIP.

See INTERROGATORIES, (3).
STAMP.

PENAL ACTION.

Limitation by 31 *Eliz. c. 5, s. 5.*

The 31 Eliz. c. 5, s. 5, includes penal actions where the penalty is given to a common informer alone, and, therefore, he must sue within one year after the offence committed. *Dyer* v. *Best*, 189

PENALTY.

See CUSTOMS.
PARISH OFFICER.

PLEADING.

See APPRENTICE.
BANKRUPTCY, (1), (2), IV., VI.
BILL OF EXCHANGE.
PROSTITUTE.

(1). *Equitable Defence.*

I. Proof of a debt under an adjudication in bankruptcy cannot be pleaded in bar as an equitable defence to an action for the same debt. *Spencer and Edwin Hewett* v. *Cecile Demett*, 127

II. To a declaration for breaking and entering the plaintiff's close and pulling down a wall, the defendant pleaded that B. was seised in fee of the land in which &c., in trust to pay the rents and profits to the defendant's wife for her life; and that whilst the defendant and his wife were in occupation of the land, B., in breach of trust, conveyed the land in fee to the plaintiff, who had notice of the breach of trust, and that afterwards, and whilst the defendant and his wife were in such occupation, the plaintiff wrongfully built the wall which encumbered the land, and prevented the defendant and his wife from enjoying it; wherefore the defendant, in his own right, and by direction of his wife, pulled it down. —*Held*, that the plea afforded no defence on equitable grounds to the action. *Drake* v. *Pywell*, 78

(2). *Plea to Claim for Writ of Injunction.*

A defendant cannot plead to a

POWER.

See DEVISE, (4).

PRACTICE.

(1). *Venue in Information by Attorney General of Prince of Wales to recover Dues payable for him in right of his Duchy of Cornwall.*

In an information by the Attorney General of the Prince of Wales, to recover dues alleged to be payable to him in right of his Duchy of Cornwall, the Court refused to change the venue from Middlesex to Devonshire on the ground of inconvenience and expense in bringing the defendant's witnesses from Torquay to London, it appearing that it would be more convenient for the Attorney General to try in Middlesex.

It is incumbent on the officers of the Crown to make out clearly the prerogative in any case where they claim to be on a different footing from the subject as regards procedure in any litigation.

The rights of the Prince of Wales in respect of the Duchy of Cornwall are on the same footing as those of the Crown: Per *Bramwell*, B. *The Attorney General of the Prince of Wales* v. *Crossman*, 568

(2). *Death of Plaintiff in Action for Personal Injuries between Verdict and Judgment.*

An action for personal injuries is within the 15 & 16 Vict. c. 76, s. 139.

Therefore, where the plaintiff in such an action died between verdict and judgment, *Held*, that judgment signed within the time prescribed by that section was regular.

The Court refused a new trial, although the damages would probably have been less if the proximity of the plaintiff's death had been foreseen. *Kramer* v. *Waymark*, 427

PRISONER.

See BANKRUPTCY, (11).

PROSTITUTE.

Supply of Brougham to Prostitute for use of her Immoral Vocation.

To a count for the hire of a brougham the defendant pleaded that at the time of the alleged agreement she was, to the plaintiffs' knowledge, a prostitute; that the agreement was for the supply of a brougham which, to the plaintiffs' knowledge, was to be used by the defendant to assist her in her immoral vocation; and that the agreement was made by the plaintiffs in the expectation of payment out of the defendant's receipts as a prostitute. The jury having found that the brougham was supplied by the plaintiffs with the knowledge that it was to be used by the defendant as part of her display to attract men.—*Held*, that the last averment in the plea need not be proved, the other averments constituting a good defence without it. *Pearce and Another* v. *Brookes*, 358

RACE.

(1). *Agreement by two Persons that each shall run his Horse against that of the other, and that Winner shall have both Horses.*

An agreement by two persons that each shall race his horse against

that of the other, and that the winner shall have both horses, is null and void by the 8 & 9 Vict. c. 109, s. 18, as an agreement by way of gaming or wagering, and is not a subscription or contribution, or agreement to subscribe or contribute, for or toward any prize within the meaning of the proviso of that section. *Coomes* v. *Dibble*, 375.

(2). "*Public Races*" *within* 6 *Geo.* 4. *c.* 81, *s.* 11.

Races were held in a field occupied by an individual who let it for that purpose; and any one of the public, on payment of a small sum, was admitted into the field.—*Held*, that these races were "public races" within the 6 Geo. 4, c. 81, s. 11, which enables any person licensed to sell beer by retail to be drunk on the premises to carry on his business in booths, tents, or other places at the time and place of holding any "public races." *Boughey, Appellant*, v. *Rowbotham, Respondent*, 711

RAILWAY COMPANY.

See EVIDENCE, (2), I., II.
JOINT STOCK COMPANY.
NEGLIGENCE.

(1) *Agreement by Promoter to pay Costs of Act of Incorporation, and Provision in Act that Costs of obtaining it should be paid by the Company.*

The plaintiff induced certain persons to become the promoters of a railway Company and co-operate with him in obtaining an act of incorporation, upon an express agreement that he would pay all the costs of obtaining and passing it. The Act passed, and provided that all the costs of obtaining and passing it should be paid by the Company.—*Held*, that the plaintiff was bound by his agreement, and could not recover the costs. *Savin* v. *The Hoylake Railway Company*, 67

(2). *Agreement by Railway Company with Land Owner that if they obtained an Act of Parliament they would construct Railway through his Land and pay him a certain sum, and also compensation for Damage he might sustain by construction of Railway.*

By articles of agreement between a railway Company and the plaintiff, after reciting that the Company intended to apply to Parliament for an Act to make a railway which would pass through the plaintiff's estate, and that he had agreed to withhold his opposition upon the terms and conditions thereinafter contained, it was agreed:—1. That if the bill passed, the Company would construct the railway so that it should pass through the plaintiff's estate at certain defined points. 2. That the Company would purchase from the plaintiff, and he would sell to them, at the price of 2000*l.*, certain portions of his estate required for the railway. 3. That the Company would, in addition to the said sum of 2000*l.*, and within three calendar months after the passing of the bill pay the plaintiff the further sum of 2000*l.* as and for a personal compensation for the annoyance, inconvenience and disturbance, damage, loss and injury which he had sustained, and might or would sustain, in respect of the sporting and preservation of game upon his estate, by or in consequence of the construction of the railway, and of the parliamentary and other surveys and other works connected therewith and incidental thereto. The bill having passed, to an action

by the plaintiff for not paying the compensation, the defendants pleaded: first, that the railway was never constructed, and that they had not required or taken the plaintiff's land. Secondly: that the plaintiff did not sustain annoyance, inconvenience, disturbance, damage, &c., in respect of the sporting and preservation of game upon his estate in consequence of the construction of the railway or of the parliamentary or other surveys, &c. On demurrer to the pleas:

Held.—First: that the pleas were bad, inasmuch as the defendants had absolutely contracted, upon a given event, to pay the 2000*l.*

Secondly, that it did not appear upon the face of the pleadings that the contract was ultra vires.

Thirdly, that if no damage had been in fact sustained and the agreement was merely colourable, that fact should have been alleged, and would have afforded a good defence: Per *Bramwell*, B., and *Pigott*, B. *Sir Charles Taylor, Bart.*, v. *The Chichester and Midhurst Railway Company*, 409

(3). *Packed Parcels—Inequality of Charge.*

The defendants, a railway Company, bound by their act of parliament to take the same rates and tolls from all persons alike under the same or similar circumstances, charged a tonnage rate upon goods over 1 cwt., and a higher rate for articles under that weight. When several parcels, each under 1 cwt., were delivered to the defendants by one person in a single consignment, at one and the same time, and addressed to the same consignee, the defendants charged a tonnage rate upon their aggregate weight. The plaintiffs, common carriers, sent by the defendants' railway large consignments of goods directed to themselves as consignees, each consignment consisting of several packages, many of them having the names and addresses of the persons to whom the plaintiffs intended to deliver them. The defendants charged the plaintiffs for each package contained in each consignment according to the weight of the package.—*Held*, an inequality of charge, and that the plaintiffs were entitled to recover back the excess.

The plaintiffs carried goods from London to the Isle of Wight, using the defendants' railway for the carriage to Southampton. The defendants, whose railway did not extend beyond Southampton, also carried goods from London to the Isle of Wight. The defendants charged the plaintiffs for the carriage of goods from London to Southampton a higher rate in proportion than, under a contract to carry from London to the Isle of Wight, they charged their customers for the carriage between London and Southampton; but for the carriage between the two latter places they charged the plaintiffs and the rest of the public alike.—*Held*, no inequality of charge. *Baxendale and Others* v. *The London and South Western Railway Company*, 130

(4). *Liability for Damage to Goods where Railway Company undertake to carry Goods to a distant place over Lines of other Companies.*

A package addressed to the plaintiff was delivered to P. at Worcester, to be carried from Worcester to Chester. P. (who acted as agent for receiving goods both of the Great Western Railway Company and the London and North Western Railway Company), delivered the package to the

Great Western Railway Company, with directions that it should go by the London and North Western Railway. The Great Western Railway Company made out a way bill in the usual form of their way bills. The London and North Western Railway Company have no communication with a station at Worcester, but their line joins the Great Western Railway at Stafford. The package was carried in a waggon of the Great Western Railway Company to Stafford, and from thence on the line of the London and North Western Railway Company to Chester. The contents of the package having been damaged on the journey:—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that there was evidence from which the jury could properly find a contract by the Great Western Railway Company with the plaintiff to carry the whole distance from Worcester to Chester, and therefore they were liable for the damage. *Webber* v. *The Great Western Railway Company*, 582

REGULÆ GENERALES,
121, 123, 124, 280.

RELEASE.

See BANKRUPTCY, (2), III.

RESERVOIR.

Damage from constructing Reservoir over old Coal Working.

A person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in *at his peril*, and, if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape.

The defendant made a reservoir for water on his land, and in the selection of the site and the planning and construction of the reservoir employed a competent engineer and competent contractors. In excavating the bed of the reservoir five old shafts were met with, running vertically downwards to old coal workings under the site of the reservoir, and communicating with the plaintiff's colliery by means of other old coal workings under intervening lands. These shafts were filled with soil of the same kind as that which immediately surrounded them, and it was not known to or suspected by the defendants, or the persons employed by them in planning or constructing the reservoir, that they were shafts which had been made for the purpose of getting coal under the land beneath the reservoir, or that they led down to coal workings under its site. When the reservoir was completed, and partially filled with water, one of these shafts burst downwards, in consequence of which the water flowed into the old workings underneath the reservoir, and by means of the underground communications into the plaintiff's colliery, and flooded it. There was no personal negligence or default on the part of the defendants, but reasonable and proper care and skill were not exercised by the persons employed, with reference to the shafts, to provide for the sufficiency of the reservoir to bear the pressure of water which, when filled, it would have to bear.

Held, in the Exchequer Chamber (reversing the judgment of the majority of the Court of Exchequer), that under these circumstances the defendants were responsible for the damage done to the plaintiff by the water from the reservoir flooding his colliery. *Fletcher* v. *Rylands and Another*, 263

just manage to exist on my wife's. We have hard work to get on, but I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week."—*Held*, a sufficient acknowledgment within the 9 Geo. 4, c. 14, s. 1, to take the case out of the Statute of Limitations: Per *Bramwell*, B., and *Channell*, B.—Dissentiente, *Martin*, B. *Lee* v. *Wilmot*, 469

SUCCESSION DUTY.

(1). *"Succession" derived from exercise by Donee of general Power of Appointment charging Annuity on Lands, and New Succession acquired by Annuitant from him, as Predecessor.*

In 1851, a testator devised certain real estate to his wife for life, with a general power of appointment. The testator died in 1856, and in 1858 his wife exercised the power by appointing an annuity of 200*l.* a year, charged upon the lands, in trust for the wife of the testator's nephew.—*Held*, that under the 4th section of the Succession Duty Act, 1853, the testator's wife, at the time she exercised the power, became entitled to the property appointed as a "succession," and that the annuitant acquired a new succession from her, not from the testator, as predecessor, and was therefore liable to pay 10*l.* per cent. duty. *The Attorney General* v. *Archer Upton, Robert Upton and Henry Jenkinson*, 336

(2). *Real Estate devised to Trustees with Power to appoint Agents, Receivers, Surveyors, Bailiffs, &c., and to pay them out of the Rents and Profits.*

A testator devised his real estate to trustees, upon trust to pay out of the rents and profits certain annuities and the interest on mortgage debts, and subject thereto upon trust for C. for life with remainders over. The entire management of the estate was vested in the trustees, and they were authorized to appoint agents, receivers, surveyors, bailiffs and others, and out of the rents and profits to pay the persons so employed such reasonable salaries, wages or other allowances as the trustees might think fit.—*Held*, that, in estimating the succession duty, the cestui que trust was not entitled to any deduction in respect of the sums paid to the persons so employed. *In the matter of the Succession of Earl Cowley to Real Estate under the Will of the Earl of Mornington, deceased*, 476

TENDER.

See BANKRUPTCY, (2), IV.

TROVER.

See INTERROGATORIES, (1).

TRUSTEE.

See BILL OF EXCHANGE.
JOINT STOCK COMPANY, (2).

VENDOR AND VENDEE.

Sale of Land by Auction, subject to Conditions that Mistake or Error in Description should not Annul Sale, but equivalent Compensation should be given to be settled by Two Referees.

The defendants put up certain properties for sale by public auction, subject to the following condition:—"If any mistake be made in the

description of any of the properties, or if any error shall appear in the particulars of sale, such mistake or error shall not annul the sale of the lot to which such mistake or error may relate, but in such case a reasonable compensation or equivalent shall be given or taken as the case may require either way, such compensation or equivalent to be settled by two referees, one to be appointed by either party, or an umpire to be named by the referees before they enter upon the reference, whose decision shall be final." The plaintiff was the purchaser of a house, and after the execution of the conveyance, he discovered an error in the rental as stated in the particular, and accordingly claimed compensation.

Held.—First, that the condition was not limited to errors discovered before the conveyance was executed, and that he was entitled to compensation.

Secondly, that the settlement of the amount of compensation by the referees was not an "arbitration" within the meaning of the 12th and 13th sections of the Common Law Procedure Act, 1854. *Boss and Another* v. *Helsham and Others*, 642

VENUE.

See PRACTICE, (1).

WAGER.

See RACE, (1).

WATERCOURSE.

See NUISANCE.
RESERVOIR.

Right to Maintain Action fo straction of Water flowi Plaintiff's Mill through Ar Stream made by permissi Riparian Proprietor.

In the year 1804, by memor in writing, not under seal, a ri proprietor agreed to allo plaintiff, the occupier of a erected on land abutting on a ral stream, to make a goit t the land of the former, the paying for the privilege the sum of 5*s*. The goit was mad from thence the water of the flowed through it to the pla mill, which it worked, and t turned into the stream at a below. The defendant abs the water above the point wh goit commenced, whereby t to the plaintiff's mill was nished.—*Held*, that the plain not a mere licensee, but a under the agreement a ri respect of which he could m an action against the defenc abstracting the water. *Nu Bracewell*,

WILL.

See DEVISE.

WITNESS.

See EVIDENCE, (3).

WRIT OF SUMMO

See AMENDMENT.

THE END.

RAYNER AND HODGES, PRINTERS, FETTER LANE, E.C.